Rochester Telephone Corp.[1] ***and*** **Local 1170 of the Communications Workers of America.** Case 3–CA–20004–2

January 19, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On October 30, 1998, Administrative Law Judge Robert T. Snyder issued the attached decision. The General Counsel and the Union have filed exceptions and supporting briefs. The Respondent has filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Doren G. Goldstone, Esq., for the General Counsel.

Jeremy P. Sherman, Esq. and *Kenneth D. Schwartz, Esq. (Seyfarth, Shaw, Fairweather & Geraldson, Esqs.),* of Chicago, Illinois, and *Robert V. Heftka, Esq*., of Rochester, New York, for the Respondent.

David A., Mintz, Esq. (*Weissman & Mintz, Esqs.*), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge**.** This case was tried before me in Henrietta and Rochester, New York, on May 19 through 23, and June 16 through 18, 1997. The complaint alleges that after commencing negotiations in October 1995 for a successor collective-bargaining agreement with Local 1170 of the Communications Workers of America (Local 1170 or the Union), and the Charging Party herein, on behalf of an appropriate unit, the Rochester Telephone Corporation (RTC), the Company or Respondent, in April 1996 prematurely declared that its negotiations with the Union had reached an impasse, and unilaterally implemented its last bargaining proposal, and, as a consequence, Respondent has failed and refused to bargain in violation of Section 8(a)(1) and (5) of the Act. The alleged unilateral implementation included changes in such subjects as wages, prepension leave benefits, employee health care, pension benefits, and retire health care for current employees upon retirement, each of which is alleged as a term and condition of employment and a mandatory subject for the purpose of collective bargaining.

In its timely filed answer, Respondent denied having prematurely declared impasse or having unlawfully unilaterally implemented its last bargaining proposal, or having committed any unfair labor practices by its conduct, but admitted having declared negotiations were at an impasse and that it then lawfully and unilaterally implemented its final offer. In its answer Respondent asserted three affirmative defenses. In the first, it claimed that as a consequence of a bonafide impasse in bargaining on April 8, 1996, its statutory duty to bargain was suspended and it lawfully implemented its final offer on that date. In the second, it claims that the Union's bad-faith and surface bargaining suspended its own statutory duty to bargain on the date and permitted it to implement its final offer. In the third defense, Respondent asserts that because of the Union's unlawful insistence on a permissive subject of bargaining, its own statutory duty to bargain was suspended and the implementation of its final offer was likewise lawful.

---

[1] We grant the Respondent's motion to change the caption reference from "Rochester Telephone Corporation" to "Rochester Telephone Corp."

[2] The parties have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] Although we adopt the judge's conclusion that the parties reached a bargaining impasse, we disavow his suggestion that the "central inquiry" in determining the existence of an impasse is "whether the Union made sufficient progress in meeting the Company's perceived needs and goals" by its counterproposals and by other actions. It is well settled that:

> A genuine impasse . . . exists only where the parties have exhausted all avenues for reaching agreement and there "is no realistic possibility that continuation of discussion at that time would have been fruitful." There is no impasse where one of the parties makes concessions that are not "trivial or meaningless . . ." for a concession by either party "on a significant issue in dispute precludes a finding of impasse even if a wide gap between the parties remains because under such circumstances there is reason to believe that further bargaining might produce additional movement." . . . The essential question is whether there has been movement sufficient "to open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions."

Hayward Dodge, 292 NLRB 434, 468 (1989), and authorities cited therein (internal citations omitted). We adopt the judge's conclusion that the parties here had reached impasse because we agree that the Union's counterproposal of April 8, 1996, under all the circumstances, did not create a "reason to believe that further bargaining might produce additional movement" by either party.

We agree with the administrative law judge that *Serramonte Oldsmobile*, 318 NLRB 80 (1995), enf. denied in part 86 F.3d 227 (D.C. Cir. 1996), is distinguishable from this case. We do not rely on the judge's analysis and application of the circuit court's decision in *Serramonte* to the facts here. In addition, contrary to the judge, we do not rely on the fact that the Union was engaged in a campaign to generate public support for its bargaining positions as evidence that the parties were at impasse.

In Member Hurtgen's view whether an impasse exists requires a multifactor test which is highly fact and circumstance driven. He does not agree that the selective criteria set forth in this footnote are necessarily determinative of the issue. See his dissent in *Grinnell Fire Protection Systems Co.,* 328 NLRB 585, 588–591 (1999).

Posttrial briefs were each filed by counsel for the General Counsel, the Union, and Respondent and they have been carefully considered.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times, Respondent, a corporation, with an office and place of business in Rochester, New York (Respondent's facility), has been engaged in the furnishing of telephone services. During the 12-month period ending November 30, 1996, Respondent, in conducting its business operations described, derived gross revenues in excess of $100,000. During the same period of time, Respondent, in conducting the business operations, purchased and received at its Rochester, New York facility goods and materials, valued in excess of $5000, directly from points outside the State of New York. Respondent admits, and I find that at all times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits, and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Bargaining History, Changes in Respondent's Corporate Structure and Regulatory Setting, and the Parties Contrary Understandings of Respondent's Economic Health on the Eve of Bargaining for a Successor Agreement

The Union has had over a 40-year bargaining relationship with RTC, representing all nonsupervisory employees of the plant service department and the plant engineering and construction department of the Company.

The most recent collective-bargaining agreement between the parties was effective from November 23, 1992, through January 31, 1996.

As described by Union Vice President Linda McGrath, a nonemployee, who participated in several prior bargaining negotiations as well as the negotiations for a successor agreement to the one expiring January 31, 1996, RTC supplies telecommunication services to residents and businesses, with headquarters located at 180 South Clinton Street, Rochester, New York, and maintains several satellite facilities and repair services at 20 to 25 locations, which include garages to which outside employees report for their daily assignments. When bargaining commenced for a successor agreement the bargaining unit comprised some 600 employees. The plant service department employs telecommunication specialists, com-tech communication technicians, PBX technicians, line technicians, and repair service clerks. The engineering and construction departments employ cable splicers, line technicians and clerical employees.

As a public utility, RTC's local telephone exchange services and operations are regulated by the New York State Public Service Commission (the PSC). Starting sometime in 1993, RTC sought the Union's assistance in obtaining permission from the PSC for the formation of a new holding company, Frontier Corporation (Frontier), of which RTC would become a subsidiary continuing to operate and manage the telephone services provided in the greater Rochester, New York area.

Under the Company's petition, Frontier Corporation would be free of regulatory controls in operations outside of the Rochester market, and, indeed, later evidence establishes its operations in a number of other States and markets, a number of which operations resulted from corporate mergers between Frontier and other entities. Later testimony established that Frontier owns approximately 29 other telephone companies.

The Union's assistance came through the vehicle of a partnership for progress agreement which it entered with RTC. Later testimony established that as a condition of PSC's approval, thereby permitting Frontier to become the new holding company free of considerable regulatory control, RTC was compelled to surrender its monopoly over telephone service in Rochester and such services were opened to competition. As later explained on the record, technically, Frontier succeeded Rochester Telephone Corporation as the holding Company, which previously had telecommunication operations outside the Rochester area, Rochester Telephone Corporation ceased to exist and Rochester Telephone Corp. was formed as a wholly owned subsidiary of Frontier to operate the local Rochester telephone and related services business. It is Rochester Telephone Corp., which is the Company that has retained the collective-bargaining relationship with the Union.[1]

The provision for these changes is set forth in a document described as the "Open Market Plan" (OMP), which was approved by the PSC and implemented on January 1, 1995. The PSC regulates and establishes telephone rates charged to customers as well as telephone service requirements. It also guaranteed RTC a rate of return on its investment. As a result of the institution of the OPM, a regulatory price freeze was placed on telephone services for a period of 7 years and other local rates were reduced over the first 3 years of the OPM, costing RTC $21 million, or almost 7 percent of RTC's gross revenue. A rate of return was apparently no longer guaranteed. RTC also continued an obligation under the OMP as provider of last resort, being required to provide local telephone service to all customers. Its competitors had no such obligation. It was also subject to seeing its most lucrative customers stolen away by its newly enfranchised competitors. The Company saw a market fraught with dangers as it entered unchartered waters, having lost its monopoly position in providing telephone and accessory services, making it necessary to become more competitive and efficient in its operations and subject to competitive pressures and attacks it had never faced before.

In spite of these changes, going into the start of negotiations for a successor agreement, in late 1995, the Union had an understanding from company representatives and newspapers that RTC was doing extremely well, having already recorded record

[1] Nonetheless, and in the absence of any motion from Respondent seeking to change the proper name of the Respondent, the caption will retain the name of Rochester Telephone Corporation as the proper name of the Respondent. However, should an order ultimately issue in this proceeding against Respondent the record now reflects the existence of Rochester Telephone Corp. as successor to Rochester Telephone Corporation.

profits in 1995 of $95 or $96 million a substantial number of unit employees were working a record number of overtime hours, sufficient to earn double time, which was required after 49 hours in a week. At the same time, the Union's understanding was that beginning in 1995 the Company's use of outside contractors, which was permitted historically under the contract with certain conditions attached, to be discussed, infra, was increasing drastically. The union committee understood 250 to 300 contractors had been brought in from around the country to do unit work, but apparently without any adverse affect on unit employee regular worktime.

Another factor the union faced at the outset of bargaining was that out of 600 employees in the unit, 350 to 400 were pension eligible, with extensive seniority. Thus, pension issues were of paramount importance to the Union.

Previous negotiations had invariably resulted in negotiated settlements maintaining the status quo or containing some improvements in conditions and benefits. It was also the case in the past, that when negotiations extended beyond the contract deadline, the Company had agreed to extend the contract until the differences were resolved.

B. The Bargaining Leading to Respondent's Declaration of Impasse and Unilateral Implementation of Its Last Best Offer

In entering bargaining, the union committee had as its goals, some type of wage increase, putting some additional contractual restraint on contract work, improve the pension bands provided for in the current contract, and to maintain the terms of retire health care, and of active employee health care.

With respect to wages, the current agreement, expiring January 31, 1996, contained wage progression tables for different job classification with some of these tables combining a number of different classifications. Each table contained a present rate, with 6-month variances between starting employment and 60 months, a first anniversary increase at January 1, 1994, and a second anniversary increase at January 1, 1995. The majority of unit employees were probably at the top of their tables.

The expiring contract recognized an existing "plan for Employees' Pensions, Disability Benefits and Death Benefits" (the Pension Plan), which would not suffer any reduction in its benefits without the consent of the Union. Any claim of discrimination could be submitted to binding arbitration under the parties' grievance arbitration article. The plan itself was a defined benefit plan in effect for 40 years established by the Company to which it alone made periodic contributions. A letter of intent of the parties dated November 23, 1992, and attached to the expiring contract, memorialized a negotiated agreement to implement changes in the Pension Plan. Employees who retire after the agreement's ratification, will have a banding structure utilized in calculating an employee's pension benefit. Effective January 1, 1995, each pension band will be increased by $1. The band represented a sum of money which was to be assigned to the employee's occupational classification. The letter of intent notes that "this pension benefit will be based on the employee's length of service with the Company and the pension band assigned . . . . The dollar amount for the appropriate pension band, according to the time of retirement during the contract period, is multiplied by the employee's years and month's of service. When multiplied further by 12, the calculated monthly total results in the annual pension benefit amount." Attached was a table showing the pension bands for each job classification in the unit on November 23, 1992, and then on January 1, 1995, with the $1 increase, ranging in amount from $25.07 for level 1 clerk to a high of $46 for table 1.

Under the existing pension plan, an employee had to have 30 years of service regardless of age, or 55 years of age and 25 years of service to receive a full pension. There were reduced pensions for employees with 20 years of service at age 50.

Since the institution of the concept of pension bands in the 1992 agreement, the Union had sought to increase the bands by a percentage or absolute figure, as witness the $1 increase effective January 1, 1995, and such a demand was made a part of its proposals for a successor agreement.

The parties' practice for some years had also provided for the payment of prepension leave, a sum of money representing vacation credits which employees could receive once they had informed the Company of their desire to retire in the near future. Employees with 20 years of service received 2 months of full paid leave. Between 25 and 40 years of service the pay increased between 3 and 6 months. The 1987 plan agreement was described in its introduction as a devise to ease the transition of eligible employees from active employment to retirement by maintaining an employee's income level for a period of time while he adjusts to a nonworking status.

As to health insurance, the expiring agreement contained a memorandum of agreement reciting an agreement effective February 12, 1984, under which the Company will pay 100 percent of the present monthly single or family premiums for basic Blue Cross/Blue Shield coverage regardless of the amount of premium (not including any "rider package" thereto) in the case of regular employees who hold such policies issued by named providers through the Rochester Telephone Group. The Employer would also pay the full cost of any increases in premiums for such basic coverage for the life of the agreement. Employees paid for their rider package only. The Employer also paid for a major medical plan covering each employee. The Union also maintained a vision and eye care plan which also provided legal services under a trust fund covering the unit employees and to which the Company contributed monthly and which it administers jointly wit the union.

At the commencement of bargaining, the expiring 1992 agreement also provided that unit employees who retired during its term would receive 100 percent of their basic Blue Cross/Blue Shield coverage, major medical coverage paid for by the Company, and reimbursement for the monthly premium cost of medicare part B. In addition, they also received a yearly medical reimbursement from the Company of $150 for out-of-pocket medical expenses. In section 6 of article 23 of the 1992–1996 Agreement, the parties agreed that employees who retire prior to July 1, 1996, will never have to pay a premium for their basic health care coverage, where the Company pays 100 percent of the cost. The section notes the Company's contribution toward basic health care is not committed beyond June 30, 1996, for employees who have not retired.

Current benefits under the expiring contract also included a basic life insurance plan providing 1 year's wages to the surviving spouse of a deceased employee, and a disability plan, which provided, depending upon years of service, up to 1 full year's wages during a disability period as well as a pension triggered by a permanent disability of an otherwise eligible employee.

In preparation of its bargaining demands, the Union, by and large, did not seek to model its demands to those provisions appearing in contracts negotiated by sister C.W.A. locals with other communication companies located in the Eastern United States, such as NYNEX and Bell Atlantic. Neither did the Union direct the Company's attention to any particular contract benefit, except in one instance, which will be described infra. The Union was also aware in the period of bargaining, from October 1995 to April 1996, that the Company was starting to deal with competitors, including Time Warner, AT&T and another company called MDF, who had entered the Rochester telephone service market following adoption of the Open Market Plan.

Early in the bargaining process, sometime between October and December 1995, the Company presented the Union across the bargaining table with a document described as a Frontier Human Resources Bulletin dated October 1, 1995 (the Bulletin). As testified to by McGrath, a member of the Union's bargaining committee, Daniel Farberman, the Company's chief spokesman for bargaining, explained that the Company felt that the bargaining unit had to be aligned with the rest of the employees in the Frontier Corporation and the Bulletin set forth the companywide benefits to which the Union would be expected to align and which benefits the employees would be expected to embrace.

The union bargaining committee review of the Bulletin revealed that the Company was seeking major concessions in preexisting terms and conditions, including elimination of the pension plan, reduction of both current employee medical benefits as well as retiree health care benefits. At the table the Company Team explained that Frontier had been purchasing other corporations across the nation and there was a need for all of the employees of the Corporation to be aligned. A lot of the newly purchased Companies did not have defined benefit pension plans, nor did they have medical coverage or coverage comparable to RTC's.

At no time during bargaining did the Company assert an inability to pay based on financial hardship as requiring it to take a certain position on a subject of bargaining.

For the first time in the history of their bargaining relationship, the Company terminated the contract on its expiration at the end of January 1996, and ceased enforcing the dues deduction and agency shop provision of the expired agreement.

Also, early in bargaining, at the end of October or early November 1995, the union committee obtained a copy of the Company's plan to counter a strike. It contained provisions to hire many permanent replacements for striking workers, bring in all of the subcontractors and drastically increase security. At this stage of bargaining the Union had said nothing indicating that it was planning to strike.

Part of the Company's strike plan which was implemented after the contract's expiration, required the workers to return to their work locations at the conclusion of the workday, and turn in their company identification badges, keys to the company trucks, company passes, and then return in the morning on a daily basis to sign for their reissuance. Thus, employees assigned company trucks had to return them to company locations each evening. Previously, employees were able to keep their passes and keys and take their company trucks home with them.

In article 23 (sec. 6, par. 2) earlier described, of the existing agreement, the Company had expressed an intention to establish a VEBA Trust for purposes of securing health care benefits for employees who retire after July 1, 1996, the date beyond which it had not committed itself to contribute toward retiree health coverage in paragraph 1. Now, early in bargaining for a successor agreement, the union committee learned from Robert Grassi, the Company's senior pension analyst, that it had not established such a trust. This information caused a reexamination and change in the Union's bargaining proposals which it had been preparing.

Starting with bargaining held on October 3, 1995, by mutual agreement, the parties held 50 sessions. During the full period of bargaining a number of written proposals of both sides were exchanged. The first set of management proposals were submitted to the union on December 14, 1995. Upon its receipt the union committee realized that the Company was seeking many, many concessions which would be major setbacks for their membership and have long-term adverse affects on them. Among concepts foreign to the Union's experience was a proposal to freeze the pension plan, i.e., freeze the benefits available to retirees, cease any further contributions to the plan and any further accumulation of benefit arising from increased service, and thus also make it impossible for currently ineligible employees, even those with 19 years of service, to accumulate sufficient years of service to make them eligible in the future for any benefit under the plan. Another major change proposed was the reduction in retiree health care.

Among other significant proposals, management proposed the elimination of tier payments, meal money, and mileage payments previously available for employees who reported for work outside his reporting locality and in another tier or suburban or geographic boundary, and were required to work for 2 or more hours beyond the end of his tour or when authorized to use his own vehicle on a work assignments. It also sought elimination of prepension leave and the establishment of a second tier wage and benefits schedule for all new employees hired following the effective date of the agreement. A number of the changes proposed were prefaced with language indicating a desire to unify and standardize employee benefits corporate wide (among all Frontier Corporation entities and locations). Thus, company proposal 9 headed Management Proposal: Establish Standard Corporate Benefit and Retirement Plan read "Management submits this proposal in order to modify the current provisions of the collective-bargaining agreement to establish a corporate standard benefit and retirement plan."

The union committee realized that in evaluating these new and foreign company proposals it would need a lot of information to be supplied by the Company. It would also require the assistance of the research facilities of the International Union.

The Union's bargaining team included, in addition to its local president Robert Flavin and Vice President McGrath, local members and delegates John Puslowski and Dennis Stratton, and as its chief spokesman, David Palmer, area representative for the International Union. Palmer would contact the International to seek information and to evaluate information requested of and supplied by the Company.

Over the course of bargaining, there were a number of issues and bargaining subjects on which the parties reached tentative agreement. Up until early February 1996, these agreements were reduced to writing by the Company, initialed by both sides, and set aside pending final agreement. After early February 1996, this practice ceased, and although it appears that at least two agreements were reached on pending issues, they were not memorialized. The parties' explanations of the reasons for this change and whether, indeed, any tentative agreements were reached at all after February, will be discussed, infra.

Over a period of time, there were also proposals withdrawn by both parties.

Upon expiration of the old contract, the Union followed its normal practice of submitting the Company's last offer to its membership. Any new agreement would be subject to ratification by the membership. In this instance, the offer was soundly rejected, which, itself, constituted an authorization for the local Union to ask the International for it to conduct a strike note. The Local Union never sought such authorization. Instead, it sought International technical, administrative, and financial support for a corporate campaign in which it endeavored to mobilize public and sister union support to convince the Company to modify its last offer.

The Company's final offer was submitted on February 29, 1996. In bargaining which took place after that date, the Union made one counter offer on March 7 and another on April 8, the last date of bargaining, following which the Company declared impasse and implemented its final offer.

Under one subject comprising the Company's final offer, related to prepension leave, unit employees were given until April 14, 1996, to elect to retire and retain their prepension leave under the expiring agreement. Furthermore, after prodding, the Company informed the union negotiating team early in December 1995, later incorporated in its final proposal of February 29, 1996, that as to the Company's commitment to continue 100-percent payment of retiree's basic health care coverage, employees would have to be off the payroll as of December 29, 1995, and have to use up all their prepension leave prior to July 1, 1996, in order to be covered by the language contained in section 6, paragraph 1 of article 23 of the expiring agreement guaranteeing the paid medical coverage. As a consequence of these two company decisions, a large mass of employees retired December 29, 1995, and another group of between 50 and 75, retired during the period of January 1, 1996, through the beginning of April 1996.

Turning to some issues which were the subject of bargaining, and which the Union deemed important, regarding subcontracting, the existing contract, in article 3, evidenced the Company's intent not to contract out work presently and regularly done by employees for the sole purpose of decreasing available work for unit employees. In a letter of intent attached to the contract the Company agreed not to contract out work presently and regularly done by RTC employees if the affected departments are currently equipped to perform such work at a reasonably competitive cost and within the allotted time. The parties agreed to form a joint committee of equal representation to review and analyze future decisions to contract work in the plant department. Line technicians or cable splicers in construction shall receive the opportunity of 10 hours of overtime when work regularly and presently performed by them is being contracted out. If, regarding the future, no practical alternative is submitted, the Company will implement its decision to contract out work in the interests of efficient customer service and the Union may grieve and arbitrate contracting issues.

The Union felt it needed some protection for its membership. In one instance in 1995 the Company had eliminated a job title requiring the incumbents to be placed in other positions. The Union was also concerned that contracting issues were not being submitted to the committee and vastly increased contracting out posed a future threat to the unit jobs. It wanted to bring back more work and restrict future contracting. In a proposal submitted January 24, 1996, the Union sought to strengthen restrictions on company contracting and require immediate submission to arbitration of disputed company proposed subcontracting assignments in nonemergency situations. Work previously not regularly performed by unit employees was excluded and timely company use of permitted part-time and temporary employees was not affected.

In management's final proposal of February 29, 1996, it rejected the Union's proposal and agreed to retain the current provisions in the expired agreement.

The Union modified its initial proposal in this area on March 7, seeking less stringent restrictions in a new proposal to change the letter of intent, prohibiting contracting out unless of short-term duration (less than 1 month) and employees do not have the necessary skills and cannot be timely trained and it would require an extraordinary expense to purchase equipment and train employees on it and there is an emergency situation and unit employees working overtime cannot complete the work in a reasonable time. In another provision the Union sought to strengthen the joint contracting committee's consideration of contemplated contracting out matters.

By April 8, with the Company standing pat, the Union withdraw its contracting proposal and agreed to return to the letter of intent with some modifications, retaining some of the language from its March 7 proposal. The Company implemented, as part of its final offer, its final position retaining all of the contracting out provisions of the expired agreement.

On layoffs, another issue the Union considered important, while the Union proposed no layoffs for the life of the contract, in its final proposal of February 29, the Company proposed a jobs bank concept as part of a comprehensive goal to provide employment security within an environment promoting operational effectiveness. The Company committed to no layoffs of any employees at work, or on approved leave of one sort or another on the effective date of the agreement (a so called secured employment level or SEL). Any employee whose regular job is eliminated as a result of any applicable provision of the then current agreement would be protected from layoff under the jobs program. An employee in the program, could be assigned to temporary work inside or, on a voluntary basis, outside the unit, but at his last regular rate of pay.

In its March 7, 1996 counterproposal, the Union proposed adding to the Company's jobs bank proposal a provision giving employees in the job bank first preference to fill any job openings within the bargaining unit and prohibiting employee placement in the jobs bank before that employee has done the work of temporary employees or contractors so long as he is qualified.

By April 8, 1996, the Union had agreed, in principle, to a company counterproposal requiring that any employee in the jobs bank would have first preference to fill any job openings within the unit provided he is qualified to do the work. The Union would have added language that the employee was qualified or could be trained to be qualified within a reasonable period of time.

Turning to the issue of the retirement income vehicle for employees, the existing 401(k) plan, provided for voluntary employee contributions, and for an increasing percentage match by the Company, so that effective January 1, 1995, the Company was contributing a total of 30 percent of each employee's contribution up to 6 percent of the employee base compensation. Two types of investments options were listed for employee contributions, an interest income account containing an annual guaranteed rate of return and the other, a specific investment such as Rochester Telephone common stock. Investments could be split between the two funds. Distribution by way lump sum, installment payments or an annuity was available, without tax penalty, on retirement, death, disability or other employment termination. This investment vehicle was separate and apart form the Pension Plan previously described.

Apparently, during the term of the 1992–1996 agreement, the Company chose as the sole investment vehicle for its own matching contributions, its own RTC stock, and required this match to be maintained for 5 years from the date of contribution.

The Union's goal in bargaining was to increase company contributions up to 60 percent of the employee's contribution, to increase employee base pay by adding in overtime pay, and to eliminate the requirement of Company's matching investments in its own stock.

In a tentative agreement initialed on February 5, 1996, the parties agreed to modify the existing 401(k) plan by deleting an age 21 and 1 year of service eligibility requirement, permitting employee investments to be made into any one or more of six investment accounts managed by the Putnam Fund, including a company stock fund, and including overtime wages in base compensation for purposes of computing percentage employee contributions. The Union continued to insist on matching company investments greater than 30 percent and that it invest its contributions in vehicles other than company stock. Indeed, the company position now in bargaining for a successor agreement, was that it would only guarantee to make an annual .5-percent contribution of employee pay on behalf of each employee and, further, to make a matching contribution of 3 percent of the employees' first 3 percent contribution of their own pay, but only for 1996. For years beyond, the Company's match would be based on its profitability.

The Company also made an offer in lieu of any wage increase and which was designed to replace article 33, section 1, paragraphs 1 to 4 dealing with wage rate changes and cost of living adjustments. The company proposal provided that all employees covered by this Agreement will be eligible to receive a compensation bonus to be paid by March 1 of each year of the agreement, beginning on March 1, 1997. The bonus percentage, calculated on employees base wage rate, would vary, between 3 percent for meeting a threshold production, efficiency and consumer satisfaction goal, to 7.0 percent for meeting a standard goal, and 12 percent for achieving a premier goal. The criteria and calculations for achieving these goals was to be set by the Company. Thus, the language, "This bonus will be paid only if the Corporation meets the performance measure objectives that it sets for itself each year." In addition, the Company offered a 1995 corporate performance bonus in the amount of $1000 to be paid to employees within 30 days of ratification. Needless to say, none of these bonuses, when paid would increase base pay, for example for purpose of calculating employee contributions to the 401(k) plan or for any other purpose in which base pay may have played a role in determining employee benefits.

Under the Company's proposal, the form of the 401(k) plan it proposed became the sole, continuing retirement investment and saving vehicle for newly employed unit employee, and the main such vehicle for employees who, of course, would continue to have frozen pension accounts maintained for them under the Company's plan so long as they had achieved the minimum years of service required, which had been 20, but which the Company proposed to lower to 17.

The Union had serious concerns about the Company's proposal. There were employers at the present time not contributing to the 401(k) and many who could not afford to do so. Furthermore, the sole source of retirement funds for many employees at the Company, at least the portion contributed by the Company, would be reliant on the value of Company stock which was then going down. Thus, the employees would have no guarantee of a retirement plan.

In the end, the Union in its counterproposal, sought to no avail increasing company matches of 40, 50, and then 60 percent of the employee's first 6-percent contribution and getting the Company to invest in vehicles other than company stock.

As noted by Union Vice President McGrath, the company's proposals on freezing the pension plan and changing retiree health benefits were consistent with the Company's human resource bulletin presented to the Union in bargaining. The October 1995 bulletin, at page 13, describes the decision Frontier took to standardize on one system of employee retirement and savings by choosing the 401(k) plan, the Frontier Group Employees' Retirement Savings Plan (ERSP) as the best approach for the kind of lean and competitive company it intended to be. The article goes on to relate that as of December 31, 1996, defined benefit pension plans sponsored by Frontier (or any predecessor company and/or operating subsidiaries) for nonbargaining unit employees will be frozen. The article does not note, but the elements of collective-bargaining law, permit a

Company such a Frontier to offer to freeze an existing defined benefit pension plan and offer its ESRP during bargaining for the employees in a bargaining unit, such as the RTC employees, and, in reliance on an alleged valid bargaining impasse, to unilaterally introduce the ESRP as the sole retirement income plan for its employees. Such was the course the Company followed in the instant proceeding. Furthermore, the company negotiators, as earlier noted, expressed to the union team, their intent to introduce an ESRP into the bargaining unit.

It is also interesting to note in this regard that the bulletin discusses amendments to existing defined benefit pension plans designed to ease transition to a 401(k) plan as the sole retirement vehicle, referring specifically, at page 14, to amendments it made to the Rochester Telephone Corporation Management Plan, retroactive to August 16, 1995, reducing current service requirements of 30 years, to 27 years, reducing age and service requirements from age 55 plus 20 years of service, to age 52 plus 17 years, among other changes, and increasing pension benefit formulas by a factor of 20 percent for all participants with 5 or more years of service on December 31, 1996. These same amendments to the Pension Plan covering unit employees, including like reductions in service and age requirements and a 20-percent increase in pension bands, were included in the Company's final offer and later unilaterally implemented on its declaration of impasse on April 8, 1996.

As to the subject of retiree health care, the Union in its proposal sought to extend the July 1, 1996 date appearing in the existing contract as the last date for employees to retire and receive the Company's guaranteed basic health care coverage (see art. 23, sec. 6, par. 1), to July 1, 1999. This was the only change sought by the Union on this subject. The Company, in its proposal, wanted the retiree health care based on the corporate plan which meant it would pay 1995 Blue Choice rates only. Those rates equated to $225 a family, $100 a single person, per month. Out of that sum the retiree would have pay their own major medical and to pay for his or her spouses' Medicare Part B. Previously, under the expired agreement the Company paid for major medical and contributed $28.60 per month for each member and spouses' coverage under medicare Part B, out of a total charge of $46 to $48 per month. The Company's offer also withdrew the $150 a month reimbursement to retirees for such out of pocket expenses as eyewear and prescriptions. And free phone service for retirees was also withdrawn. The $225, the 1995 premium rate, was offered by the Company for the life of the successor agreement. Blue Choice is the less costly HMO plan offered by Blue Cross/Blue Shield in the Rochester area. This proposal for retirees follows the Frontier Bulletin, which at page 15, states that, effective January 1, 1997, for future retirees, company contributions to retiree health care will be capped at 1995 dollar levels. The Company's offer of Blue Choice is also consistent with page 3 of the Frontier Bulletin which discusses the development of Tel Flex, a plan designed to standardize benefit plan offerings corporatewide, and to be offered beginning January 1, 1996, which, in the Rochester area, called for the use of the community rated Blue Choice or Preferred Care HMO in 1996. Finally, in discussions at the bargaining table concerning retiree health care the Company made reference to the Frontier Bulletin.

Tel Flex is described as a cafeteria style plan permitting the employee to select a personalized benefit package. Under it, employees are provided with a certain number of benefit dollars, to use as they go shopping for an individualized benefit program. The dollar allowance, in 1996, would equal 70 percent of the price of Medical Plan Option (Blue Choice in Rochester), 70 percent of Dental Plan 1, 70 percent of the Vision Plan plus the price of described life insurance, accidental death and dismemberment insurance and long term disability insurance.

In its final offer of February 29, 1996, the Company, which had previously insisted on the Tel Flex (even rating) benefits package for all employees, now offered either the Tel Flex to all current and new employees, as presented, or to all current employees the option to remain under the current medical benefits as outlined in the expired agreement (even rating), previously described as including company payment of 100 percent of the monthly single or family premiums for basic Blue Cross and Blue Shield coverage, or to move permanently to the Tel Flex benefits package as proposed. All new employees would be offered only Tel Flex.

In discussions during bargaining, the union committee made clear that retiree health care was a major issue for the Union and that the Company's offers in this area posed major expenses for future unit retirees living on fixed incomes which they would be ill equipped to afford. In essence, the Company was taking the heart out of the retirees and future retirees.

As to retiree health care, on March 7, 1996, the Union made a counter offer including a concession, changing from July 1, 1999, to January 1, 1997, the date by which employees could retire and never have to pay a premium for basic health care coverage. As to employees who retirees after December 31, 1996, the Company will pay 100 percent of present basic coverage or 100 percent of HMO coverage, depending on coverage on their date of retirement. The Union's April 8, 1996 proposal appears to repeat this offer. The Company rejected it and continued, without change, to assert its final offer, of paying 100 percent of the cost for basic coverage for those who retiree prior to December 31, 1996. Beyond that date, the Company's contribution to basic health care would confirm with the benefits offered through the RTC benefits package provided to management—capping company contributions at 1995 dollar levels and applying the Tel Flex and Blue Choice medical plan option. Company contributions beyond expiration of a successor agreement, for employees who have not retired, was specifically not committed.

Another issue of importance to the Union involved the company use of temporary employees. The agreement, in section 2 of article 25, limited their use to 6 months in any calendar year, except they may be utilized up to one to replace a regular employee on leave of absence or out on disability. The Union sought to place a cap on utilization of temporary employees, expressing the view that the Company had been abusing their use, retaining some for up to 2 years, and going well beyond their prior use as summer student replacements. Temporaries received no wage increases or contract benefits. The argument permitted grievances but no arbitration on the issues.

Initially, the Union sought to restrict their use to 10 percent of any title. The Company in January 1996, initially sought to permit their use for up to 3 years. Later, on February 5, the Company sought a limit of 1 year and 15 percent of a job classification on their use during October to April, and no restriction May to September.

On March 7, the Union countered with a proposal limiting their use to 32 percent of outside forces and 30 percent for all other titles during May to September. On April 8, the Union changed its proposal to limit temporaries to the percentages it previously proposed only during May and September, and placed no limits on their use in June, July, and August. The Company's final offer, which it later unilaterally implemented, remained unchanged from its February 5 proposal.

The Company's offer of no wage increase, and a nonguaranteed compensation bonus, and a 1995 performance bonus, was a major disappointment for the Union. The union committee explained to the company committee that its proposal of no wage increase over a 3-year period was a very radical change for the union membership to have to accept. The Union proposed a trial program during the life of the agreement to gradually educate the members to change their thinking as it relates to a bonus versus a general increase. The Union thus proposed in its March 7 offer to reduce its proposed annual wage increases to 4, 3-1/2, and 3 percent, which it described as the same as NYNEX, with the COLA provisions remaining the same. The Union added it was prepared to discuss an additional moderate compensation bonus based on the corporation's performance measures as a trial of the Company's approach. The Union was also willing to discuss a 1995 corporate performance bonus to be paid within 30 days of ratification with the amount requiring further negotiations. The Union prefaced its March 7 counterproposal to the Company's final proposal of February 29, by noting it was making movement in 21 separate areas which it specified and ending its preface with the comment that it was also prepared to discuss modifications to these and other proposals as part of a process of good-faith bargaining.

The Company did not modify its final offer on wages, and on April 8 the Union submitted a new proposal on wages as part of a new comprehensive counterproposal, stating it was doing so even though the Company did not fully respond to its comprehensive proposal submitted on March 7. The Union noted it was requesting discussion and serious consideration of both its March 7 and April 8, 1996 proposals. The Union retained the same wage increase demand it had made on March 7. As to a compensation bonus, whereas previously the Union was only willing to discuss a moderate one, it now agreed to accept a company bonus based upon the Company's threshold, standard and premier targets. It proposed amounts of $1000 for reaching all three threshold targets, $1500 for reaching all three standard targets, and $2000 for reaching all three premier targets. This differed from the Company's compensation bonus plan which proposed paying percentages to be calculated on the employees base wage rate, varying between 3 percent for meeting Threshold objectives, to 7 percent for meeting standard objectives, and 12 percent for meeting premier objectives, such payments not being guaranteed but to be paid only if the Corporation meets the performance measure objectives that it set for itself each year.

The Union also now proposed a definite $1000 Corporate Performance Bonus to be paid within 30 days of ratification. Previously it had only been willing to discuss a 1995 bonus, with the amount subject to further negotiations. This last proposal adopted the Company's figure of $1000, but, of course, overall, the Union still demanded annual wage increases and COLA's whereas the Company proposed no such increases.

Regarding prepension leave, which the Company sought to eliminate, during bargaining, the Company had supplied the Union with a list of some 300 odd employees who were eligible for some type of prepension leave and the amounts they would receive should they retire during the 3 years of a successor contract, which included a prepension leave clause. The cost factor provided was in the neighborhood of $4.8 million. Subsequently, after the group of employees retired in December 1995, the figure dropped to $2 or $2.5 million.

As to the pension, the Company's proposal to freeze the defined benefit pension plan first made on January 22, 1996, not only would cease the accrual of any additional years of covered service for employees already vested, with at least 20 years of service, but it also meant that for those employees, with as many as 19 years but with fewer than 20 years, required for a basic pension, their time already served would be lost. As a result of freezing the pension plan, future monthly pension benefits of eligible participants would be based on the participant's accrued years-of-service and final average compensation as of December 31, 1996. The Company also informed the Union that the death benefit portion of the pension plan would be discontinued. Previously the plan had paid 1 year's pay to the surviving spouse or other beneficiary on the death of retiree, or the present wage on the death of a vested employee.

Also, the disability pension would no longer be in force when the plan was frozen. Under the disability provision, an employee out of work for up to a year who was unable to return to work would be able to receive a pension equivalent to their normal pension, provided he was otherwise eligible. The benefit of this pension to an employee was that he would not have to pay for survivors rights, which was paid automatically into the plan until the employee reached age 65, at which time he could elect to provide such benefits or not. The Company's disability proposal was part of the Tel Flex program it offered. Regarding short-term disability the plan would provide income replacement equal to 67 percent of predisability base salary for 90 days. As to long-term disability, the Company would provide 50 percent up to age 65, or longer if disabled after age 60. Employees could elect to receive 60 or 70 percent income replacement levels by paying an additional premium. I have previously described the Company's proposal to decrease eligibility by 3 years, to also decrease age and service requirements for both a full and an early retirement pension, and to increase the bands by 20 percent under the frozen pension plan.

The Company also proposed that the amount of life insurance covering each employee under the expiring agreement, equal to annual base pay adjusted to the next higher $1000 be reduced to $10,000.

The Union had early made and then modified certain proposals regarding the pension, which, following the Company's January 27, 1996 proposal to freeze the pension and to eliminate prepension leave, were never adopted by the Company by the time the Company made and later reaffirmed its final offer incorporating, inter alia*,* the January 27 proposals cited. One was to change the then requirement under the pension plan that an employee be 50 years of age with at least 25 years of service to be eligible for a survivor to receive early retirement benefits. During the term of the expiring contract, two or three employees had died before reaching 50 years of age, but with at least 25 years of service, and their surviving spouses were denied any pension benefits. Another was to change the concept of feathering as applied to wages when an employee is demoted because of a physical inability to perform a higher rated job. The expiring agreement provided for a gradual reduction in wages to the lower classified job under such circumstances. The Union in bargaining sought to extend the time frame for feathering, and the same gradual reduction in bands as applies to wages for an employee seeking to retire with a pension.

On March 7, 1996, the Union modified its prior proposal on physical demotions and pension feathering, effective February 1, 1996, now providing 36 months period before employees with 15 years or more service received the full lower classified salary on a physical demotion, and a full reduction in their pension band. By April 8, the Union had withdrawn its last proposal and agreed to accept the current contract language, providing for a maximum 24-month period for wage feathering for employees with 15 years of service (and 14 months for employees with less than 15 years), but was still seeking the phrase "wages" to be modified to include "pension band."

With respect to the pension plan, the Company had informed the Union that the plan had roughly 105 million in assets and that it had not contributed to the plan for 2 or 3 years because it was over funded. Nonetheless, according to McGrath, the Company expressed the view in bargaining that the Union could not have a settlement unless it was willing to agree to a freezing of the pension, that the corporation wanted to be aligned with all of these other employees of the corporation whether it was here in Rochester or in Minnesota or wherever. McGrath testified that she didn't believe it was ever expressed at any time that it was a question of saving money. Their position was that they needed the Union to align with the rest and embrace this proposal. During these exchanges, as testified to by McGrath, the Union felt very strongly and expressed the view at the bargaining table that it had to keep some type of defined benefit pension plan for its members. The company proposal for the 401(k) plan certainly was not going to provide the employees and members with any retirement security in the future, especially with it being based on company stock. The only guarantee was a half of percent that the Company was guaranteeing employees.

In spite of these expression of views by the Union, the union bargaining committee did consider alternatives to its initial position insisting on maintenance of the defined benefit pension plan. Although the committee members lacked the expertise to evaluate the major change in retirement security the Company was proposing, the Union had access to pension specialists on the staff of the International Union and were guided by such specialists in requesting information from the Company for evaluation by the International.

By March 1996, on the advise of the International, a cash balance account for each employee, derived from the value each employee had in the pension plan, was being raised by the Committee during bargaining. The Company had provided the Union for analysis by International experts with a print out showing the value each employee enjoyed in the pension plan, without, and then with, the increase in the bands by 20 percent. Under the union suggestion the pension plan would be converted into a cash balance account for each employee and based on actuarial figures and projected rates of return, a guaranteed return of interest would be added to the accounts over the years. In bargaining over the pension or retirement security issue, the Union's local bargaining committee looked to the International Union for advise, guidelines, and, indeed, approval, since clearly this issue had national ramifications as other employers could seek to rely on the Union's deal with the Company as setting a precedent for future bargaining with the CWA and its affiliates.

On March 7, the union counterproposal on pensions still sought to retain the current pension plan, with a 10-percent increase in bands effective February 1, 1996. As to the prepension leave, the Union agreed with its elimination as of December 31, 1996, but it sought to soften the loss with other proposals. Employees with 20 years or more of service on January 1, 1997, who retire with a service or early retirement service pension shall receive the dollar equivalent of present prepension leave or additional pension benefit during the first year of retirement. Employees with less than 20 years of service on January 1, 1997, shall receive an additional ½-percent company contributions into their 401(k). The Union also withdrew its demand for survivor rights. Finally, the Union noted its willingness to discuss transforming the pension plan into a defined benefit cash balance account.

At the March 7 meeting Union Spokesperson David Palmer explained the Union's concept of converting the pension plan into individual cash balance accounts. There was some discussion at the table, but both sides agreed that the subject matter should continue to be discussed between the actuaries and experts on both sides.

On March 7, the Company continued to assert that its final offer of February 29 still stood without any modification.

In preparation for the next (and as it turned out, the last) meeting scheduled for April 8, the union committee engaged in consultations with International Union officials and had internal discussions in a serious effort to make major movement, particularly in the areas of pension and prepension leave but in some other areas as well. On April 8 the Union presented two options. One was to keep the current pension plan in place with a modest increase in pension bands and eliminate prepension leave. In essence, it was a reiteration of the Union's March 7 proposal. The other was to establish a new 401(k) plan, freeze the pension plan, and eliminate prepension leave. Under the first option, option A, pension bands would be increased by 10 percent. It reiterates the March 7 offer to convert the eliminated prepension leave into a dollar equivalent additional pension benefit upon retirement to these employees with 20 years of service, and to add a 1/2-percent contribution into their 401(k) accounts for employees with less than 20 years.

Under option B, for the first time the Union agreed to freeze the current pension plan, and also agreed to eliminate prepension leave. Pension bands shall increase by 20 percent effective immediately upon ratification of a new agreement and all current employees will have pension eligibility requirements reduced by 3 years. These two changes had already accompanied the Company's proposal to freeze the pension, but here they were a part of more comprehensive union proposal. While the Union agreed the pension plan would be frozen, it proposed that vested employees have the option when they retire or leave the Company of receiving the value of their pension in a lump sum, and those employees who do not so opt, shall have their frozen pension benefits adjusted upward annually based on consumer price index (CPI)

In addition to the foregoing, the Union proposed under option B that the Company make a guaranteed cash contribution of 6 percent of the annual income of each employee to a single 401(k) plan for each employee, and that this 1997 contribution be guaranteed as the minimum annual contribution for each future year of the employee's service with the Company. Future contributions shall be reviewed annually and shall be calculated to generate an account balance if invested in an average money market account that would be no less than an amount sufficient to purchase an annuity substantially equal to the benefit value of the current pension plan assuming a 10-percent annual increase in the bands plus the annuity value of any employee's currently accrued prepension leave.

Finally, under option B, the Union proposes that employees may also contribute their own pretax dollars to the single 401(k) plan to which the Company shall contribute a 40-percent match of company stock under the Putnam Plan up to the first 6 percent of the employee's wages (including overtime). The match shall increase to 50 percent in 1997 and 60 percent in 1998. This third component of option B appears to repeat a separate proposal regarding the 401(k) plan (item 8) which the Union made as part of its new comprehensive counterproposal of April 8. In fact, they were duplicative.

McGrath noted that the 6-percent figure was added by hand under the following circumstances. The International Union was going to provide the Local Union with a number which it felt was necessary for the Union to maintain an account for the employees that would be equal to their pension plan. The union committee had typed up the proposal (option B) but by the time they had left the union office to meet the company bargaining team at the hotel to present the proposal the International Union had not contacted them. At the hotel, the committee was able to make contact by telephone and received the figure which was then hand inserted into the proposal.

In the period following March 7 the union committee was acting with a sense of real urgency in an attempt to come up with an new counterproposal which would meet the Company's needs but also satisfy its members needs. The computations and analysis regarding the retirement security proposal were being conducted at International Union headquarters.

McGrath acknowledged that the formula proposed regarding future company contributions to the 401(k) plan appeared to be very complicated. At the bargaining table, the Union provided the new comprehensive proposal, the company representatives received it, look it over, said they had no questions and left the room.

Concerning health care for employees, I have previously discussed the Company's insistence, during bargaining, on promoting consistency corporatewide by proposing a Tel Flex Plan for employees, and I have explained and described the Company's proposal in this area. The existing and expiring Agreement provided, in a letter of intent, for the Company to contribute increasing amounts each contract year to a Union Health, Welfare, and Pension Fund for each enrolled employee on the payroll 31 days or more, starting at $37.50 per month, and increasing by the third year to $41.67 per month.

The Union proposed on January 26, 1996, increasing the Company's contributions $2 as of February 1, 1996, and $3 as of February 1, 1998. On December 14, 1996, the Company had provided the union team with the Frontier Bulletin and presented the Tel Flex plan appearing at page 3. In addition, the Company sought to move to "even rating" in determining company contributions toward basic Blue Cross and Blue Shield premiums. In contrast to "community rating" on which present premiums were based, and which is responsive to community costs incurred for health care, established by the State Insurance Department, "even rating" is a form of the premium permitted to be set by the insurance carriers for the following year and which is announced as early as August or September, in contrast to community rating which is not established until mid-December. Although even rating can be lower than community rating, and the carrier will reduce the following year's premium to reflect the saving, it is only the employer who benefits since the reduction, if any, comes off the basic premium, which the Company paid, and not the rider premium, which was and is borne by the employee.

By February 29, in its final proposal, the Company, as earlier noted, offered all employees the option to remain under the current medical benefits as outlined under the expired Agreement (even rating) or to move permanently to the Tel Flex benefits package as proposed, with all new employees offered only Tel Flex. As noted, the even rating would adversely affect employees who have the full cost of the rider package, and who would not receive any benefit from a reduction in the premium from one year to the next because the carrier, in this case Blue Cross/Blue Shield, applied the reduction to the premium for basic coverage paid for by the Company.

The Tel Flex plan, as earlier noted, required the employee who opted for it, as well as all new employees, to pay for major medical coverage, as well as for dental and vision care. The Company's contribution was limited to 70 percent of the Blue Choice basic ($10,000) life insurance and very limited 90-day short-term disability limited to 67 percent of base salary and only 50-percent income replacement for long term, disability to age 65. For greater disability benefits employees had to pay out of pocket.

In bargaining, the union committee informed the company team that the company offers meant a diminution of benefits for employees that they felt they had to retain. It was asking too much for the employees to take no wage increase for the next 3 years, give up their pension plan, give up their prepension, accept only a half of a percent guaranteed in the 401(k), and yet come up out of pocket to pay for their medical and greater than minimum life insurance and disability benefits. The Union pointed out that at present, employees were paying $115 to $120 per month for their rider package under Blue Cross.

On March 7, the Union sought to retain the existing medical coverage, with the Company paying 100 percent of basic coverage, and sought an option for new employees to select traditional coverage and pay the additional premium cost or receive Blue Choice with extended benefits, with company payment of 100 percent of the monthly premium.

Employees with access to other coverage, may elect to waive company coverage and receive reimbursement of 50 percent of the monthly cost of single coverage of Blue Choice with extended benefits, and retain the right to return to company coverage at their discretion. In adopting this proposal the Union was aware that under the Company's Tel Flex Plan, employees who waived coverage's and ended up with money left over from the amount contributed by the Company, could take 50 percent of the individual coverage and have it invested in their 40l(k) plan. This was a cost saving to the Company. This union proposal provided another cost saving device to the Company.

By April 8, the Union had agreed to the company proposal to increase its contributions toward traditional coverage to $43.67 and then $45.67 per month and noted that the parties had reached a tentative agreement. It continued to seek maintenance's of current benefits and reiterated its March 7 proposals regarding health care for present and new employees.

Another issue which ultimately divided the parties concerned a management proposal for a second-tier wage and benefit schedule which it retained to the end. The expiring agreement contained no such schedule and, according to McGrath, the Union had never faced such a demand before. On December 14, 1995, the Company, as part of its set of proposals, proposed a second-tier wage and benefit schedule for all new employees hired following the effective date of the new agreement. On December 28, the Company provided a wage progression table for second-tier employees and listed 14 separate second-tier employee benefits, running from Tel Flex and Managed Health Care through the 401(k) plan and a change in the holiday schedule.

The wage schedules provided excluded craft titles, retained the existing 60-month progression divided into 10 6-month periods, but reduced the wages drastically. Typically, the common top rate proposed for seven titles, running from C.O. Installer to Telecom Specialist was $598.50 after 60 months, down from $855. Later on January 26, 1996, the Company proposed extending all current wage progression tables from 60 to 96 months (8 years) with no change in the current top craft wage structure. The proposal also sought to change the existing regular clerical workweek from 37-1/2 to 40 hours. This change affected some 150 to 200 clerical titles. Some of these titles, such as repair service clerks who take customer service calls, work a great deal of overtime, which heretofore was earned at time and a half after 37-1/2 hours per week. By January 28, 1996, the Company reduced the start rate for clerical titles from $401 to $225, and reducing all subsequent rates except the final rate, which remained at $559.50. In its Final Proposal of February 29, 1996, this final rate was raised to $562. The reductions totaled 25 percent. The previous top rate was $749.50 a week. The Company also finally reduced the wage table for crafts from 96 to 84 months. At no time under the Company's proposal, would the second-tier employees achieve the same wage schedule as existing employees.

The union negotiators expressed concern at the bargaining table that the reductions were too drastic, the Company would not be able to hire qualified people at these wage rates and there would be a large turnover within the bargaining unit, as there was in the other existing unit with a lower wage scale. There would also be real morale problems which would work against the Company. In support of its second-tier proposal the Company had noted that current wages were not competitive, but provided examples of salaries in outside clerical jobs which the Union discounted as not being comparable such as CVS drugstore cashiers and clericals at a Baptist Home.

The change in holidays proposed by the Company for new employees, was a reduction of the current 11 to 6. This proposal conformed to the Frontier Corporation Paid Time Off Program, or PTO, which Frontier announced it had elected to adopt, corporate wide, effective January 1, 1996, at page 19 of the bulletin. Under it, the Company recognized paid time off for a core of six significant national holidays, New Year's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. All preexisting vacation, personal, sick and/or "CTO" programs would be terminated, and employees, with differing ranges of services, would receive a single "bucket" of days (including the six core holidays) that can be used for whatever reason varying between 19 for employees with less than 5 years of service, to 34 days for those with 25 years on January 1, 1996. New hires would began to accrue PTO with the first full pay period, but could not take any scheduled PTO time until completing 6 months of service.

The Union sought to counter these wage schedule proposals for new hires on March 7 by offering to increase clerical tables by 12 months and craft tables by 16 months. In doing so, the Union was addressing the company concern for some overtime wage relief.

Regarding equalization of assigned overtime, the expiring agreement contained a commitment by the Company, insofar as practicable, to decide overtime opportunities as equally as is reasonably possible among the employees in the group involved who are qualified to do the work. Over the term of the agreement employees had complained to the Union about company failure to equalize overtime and that they were due money. During bargaining, each side formed a subcommittee to deal with the issue. Various addendums had been agreed to over the term of the contract, and while the Union sought to include them in the new agreement, the Company sought to change certain elements of the overtime agreement. Some of these the union opposed. Among other issues outstanding, was the amount of the Company's liability.

In its final proposal of February 29, the Company submitted a Memorandum of Understanding Overtime Administration. Among other changes proposed, by this memo the Company sought to eliminate the current requirement to equalize between East/West Metro and East/West Suburban areas for Tel Com Specs (Specialists), offered to pay $69,247.94 among affected employees in full settlement of any and all past claims and permitted equalization to a spread of hours of 50 in a location and 75 between locations among construction line and colele groups in metro and suburban locations. In another change proposed under this memo, John Pulaskie, a member of the union bargaining committee, would have his overtime hours missed during 95/96 collective-bargaining negotiations as a result of his participation excluded from the overtime equalization process. This decision could be grieved but not arbitrated. The Union never agreed to all of the terms itemized in the memo and it was imposed when the Company implemented its final offer.

On March 7, the Union offered changes in five of the nine paragraphs comprising the Company's memorandum, finding acceptable four of them, but concluding that there was a significant cost in terms of loss of overtime to groups of employees it represented and to one in particular, Pulaskie, who had and was continuing to participate in the negotiations. The Union also proposed that an addendum be adopted to resolve a series of issues involving equalization of overtime for employees in frame and switch classification in a number of different locations. The Union spelled this out in a page 3 addendum to its March 7 counterproposal. The Company apparently never addressed this new addendum and failed to offer any counterproposals to the Union's proposed resolution of the outstanding overtime equalization issues. The Union deemed those overtime issues very significant to its membership.

As to another issue, payment of doubletime, the current agreement provided for doubletime payment to start after 49 hours worked in a week. The Company on January 26, proposed its elimination, maintained that position in its final offer, made no counter to the Union's counter of March 7 to pay doubletime pay after 50 hours, and ultimately implemented this change. The Union had requested data from the Company, its review of which led it to conclude that 60 percent of overtime worked by unit employees reached double-time figures.

The Company also proposed to modify existing provisions of the agreement to permit more flexible scheduling for telecommunication specialists. Previously none of them had regular work schedules including Sunday. Such a voluntary work assignment was compensated at double-time pay under article 13. The Company proposed establishing a Sunday to Thursday work schedule with 24 employees scheduled on a rotating basis, each Sunday to Thursday schedule to be followed by a Tuesday to Saturday one, and with Sunday work paid at time and a half. On March 7 the Union accepted this proposal but proposed the Sunday hours be counted toward the 49 needed to achieve double-time pay and to divide such overtime opportunity equally among employees in the group involved. No company counterproposal was received and the Company's Sunday through Thursday work schedule as it originally proposed was unilaterally adopted on implementation.

Some other company proposals were ultimately adopted by the Union by March 7, 1996, and thus, could be said to constitute tentative agreements pending a final overall agreement, even though they were not memorialized, initiated and set aside. These included such subjects as separation allowances, where the Union withdraw a proposal for a lump sum in addition to separation pay; meal allowances, where the Union withdrew a proposal to add 50 cents and provide for employees brought in early and finally agreed to such allowances to be paid to employees after 4 hours beyond their duty tour, an increase from the 2 hours the Agreement stipulated. A third such subject involved a company proposal to establish a separate air pressure work group. It would have its own separate vacation, overtime and work schedule and be separated from the rest of the telecommunications specialists. They would have better vacation selections, better work schedule and be able to continue to work the overtime of the rest of the Telecom Specialists. This proposal and preliminary discussions had predated negotiations. In making this proposal on February 29 in its final offer the Company stated its understanding that agreement had been reached. The Union had advised it was in agreement on the concept but still had to deal with some member concerns about separating out and favoring a work group which included some junior employees. By March 7, the Union noted in its counterproposal that it had accepted the company proposal.

As for discussions held at the bargaining table, during the later stages of negotiations, at a meeting held on February 26, Mickey Ash, an area director from the International Union, substituted as main union spokesman for David Palmer, who was absent. On this occasion, Ash presented a union proposal entitled Union Package No. 1. He told the company team the committee had met and felt it had to put packages together and were going to present Package No. 1 to see if they could bring things into settlement. Ash explained there were two more packages the Union would be presenting after they got through Package No.1. Ash also advised the Company that Robert Patrician (the Union's pension expert) needed the Company's figures on prepension leave as well as its subcontracting practices. It included a request for copies of existing subcontracts.

Package No. 1 referred to keeping the existing pension plan, increasing pension bands by 10 percent, transforming the prepension leave into a pension bonus, at an estimated cost of $480,000 per year, and the need to protect those currently eligible. It also referred to physical reductions, i.e., transfers because of physical reasons to a job having a lower schedule, not to be fully effective until 4 years had elapsed, and to survivor rights which should be effective without age restrictions (the reference here in all probability is to elimination of the age 50 requirement, previously discussed as a union goal in bargaining).

In the one-page submission the Union also noted its agreement to the Company's air pressure group proposal, 40 hours workweek for clericals and to new Sunday to Thursday work schedule, but adding the Union's condition that such Sunday work hours count toward the 49 currently required to receive double time pay.

At the meeting Ash also asked for information about health care, in particular the cost of Blue Cross and major medical for the past 3 to 4 years, and Union President Flavin sought information about contractors. In response to a question from Company Spokesman Farberman, Ash clarified that as to prepension leave, the Union wanted the dollar value of prepension leave to which employees were then entitled after 20 years of employment. The Union also sought information about company use of temporary employees, which was required to be supplied under the agreement, a topic also previously discussed herein.

In response to a question from Farberman as to how the Union's proposed pension bonus would work, the union committee said the accrued prepension leave could be paid as a buy out or it could be part of a cash balance account to which each individual employee's interests in the pension plan could be converted. Ash also confirmed that only employees with 20 years' service would be eligible. On a further inquiry from Farberman, Ash explained that after the buyout, the prepension leave would be terminated as an employee benefit. Flavin noted that the savings to the Company from its elimination would total $4.5 million. Robert Heftka on the company team disputed that figure, noting that as a result of yearend retirements that figure was now down to $2.5 million. And Farberman noted that $480,000 was set aside each year by the Company to pay the prepension expense. This accords with the figure used by the Union as the one time cost of transforming prepension leave into a pension bonus.

John Tassone of the Company's bargaining team, asked how the Union could agree to the elimination of prepension leave if there was going to be a payout. The Union responded that under its proposal such leave was being capped so that no one would accrue future leave.

At this February 26 meeting, the Union referred to a letter to the Company from David Palmer requesting information regarding the contractors the Company was using to perform unit work. Farberman acknowledged having the letter at the session, but suggested it referred to union interest in grieving contract violations, while Ash responded the letter and information it sought was related to union formulation of its contract work proposal which was being prepared. Farberman agreed to provide the information, and later did so in a massive submission to the Union on March 20, 1996.

McGrath explained in preparations for the February 26 meeting, the union committee believed that the Company was sincere in its desire to freeze the pension plan. Then, at a meeting the union committee held with Ash a couple of days before February 26, Ash advised that he had a conversation with Farberman at which he was informed that the pension issue was going to go away and that they needed operational concessions from the Union, such as the 40-hour workweek, the Sunday work schedule, elimination of doubletime and the pension was not going to be an issue in order to reach agreement. As a result, although there was some dissension among participants, a consensus was reached that the Union's strategy for the February 26 meeting would be to place the pension and prepension issues at the top of one package, and if they could be resolved, then to go on to those operational issues in which Farberman had said the Company needed relief, some of the union concessions regarding which would be placed at the bottom of the same package.

After a company caucus, Farberman reported that Robert Grassi, the Company's senior pension analyst, was providing information to Union Analyst Patrician related to the pension issue. The Union also questioned the accuracy of information the Company had supplied about the use of temporaries and Farberman acknowledged it has been supplied hastily. As to use of contractors, Flavin clarified that the Union was seeking names, rates of pay, and job titles but when he asked if the information would be supplied, he was ignored. In this discussion Flavin referred to the Company's PR man referring to over 350 contractors doing work in anticipation of a strike and Farberman denied that the individual, Simonetti, spoke for him.

Regarding the pension issue, the Company indicated it could add a couple of percentage points to its proposal to increase the bands, by 20 percent but they still needed to get from the union committee its position on the pension, whether it was receptive to the Company's proposal to freeze the pension or was it the Union's position there could be no settlement without the pension plan. Farberman here referred to a statement Patrician had made to the company committee that the Union was never going to move on the pension plan. Patrician had come up from Washington to Rochester on either February 22 or 23 at the Union's request to meet with the Company's pension people, in all likelihood including Grassi, to get data from them and have discussions in regard to the pension plan, its cost factors and related data. Later testimony established that he and Palmer attended an informal luncheon with company representatives a few days before February 26 when a scheduled bargaining session was canceled by the Union. Flavin responded to Farberman's comments by denying that the Union's bargaining committee had ever made that statement. Ash said that he would write the question down, that he felt the Company was asking them a question, a seeming evasion.

According to McGrath, Farberman now noted that at the informal luncheon attended by Patrician and Palmer, Palmer had made an emphatic gesture of hitting the wall while stating that the Union would never give up the pension. Farberman also mentioned that at the informal meeting, Palmer had raised the option of a cash balance account, previously described. Flavin asked whether Palmer had taken it further in their discussions at that private meeting. As of February 26, the Union had not placed a cash balance proposal on the table.

McGrath confirmed that up to this point in bargaining—late February 1996—it was the Union's position to try and maintain the defined benefit pension plan. As stated by McGrath, "We just wanted a plan that would keep the members whole. If it had to be the cash balance account with a guaranteed return on it, to make the employees whole, so that they would have the same value as the pension, we had the protection . . . . " (Tr. 429–430.)

Also, at this February 26 meeting Farberman is quoted by McGrath as stating that the pension issue was not an economic issue for the Company, that they had to be focused and be aligned.[2] Farberman also said that the Company would respond to the Union's February 26, 1996 single-page proposal either the next day or on Wednesday (February 28), in writing.

The meeting ended without union packages 2 and 3 being presented. They were later incorporated in the union counterproposal offered on March 7.

At the meeting of February 29, the Company presented Management's final proposal, stating that they were doing so as they felt that there was no movement on the Union side. Farberman kept referring to the comments by Patrician and Palmer that the Union would not move on pension, that there was no way it would give up the freezing of the pension plan. The union committee responded that it had never taken that position and it was still looking at proposals and still making movement.

The Company also expressed dismay at the Union's advertisements which had started to run in the community. Flavin responded that the Company's bargaining committee was in its present posture because Carr, CEO of RTC, was upset over the Union's ads, and the committee was just out to hardline them.

As soon as multiple copies of the Company's final proposal was handed over, the Union asked for a caucus. When the Company asked if they were going to take it out of the room Palmer said no, we would leave it there. The union committee, now again led by Palmer, went to their caucus now to talk and meet with Ash, who had remained there. According to McGrath, the union committee was shocked, because Ash had just told them that the night before Farberman had informed him the Company would not make a final proposal at this meeting.

Ash told them in the caucus room he was as shocked as they were, to go get the proposal, review it and come back with it. The committee returned to the bargaining room and discussed the proposal across the table.

Palmer asked why the Union was getting this final proposal when Farberman had told Ash they were going to get the brother of the final proposal. Farberman responded that since the Union was not embracing their issues, therefore they were putting the final proposal on the table that the Union had to accept or else. Farberman noted that they had never seen union packages 2 or 3 and therefore the Union had not moved enough to embrace their total package. The union committee informed the Company that they were still looking at the Company's pension package, prepension package, their whole major issues, and they were still trying to come to a settlement. Flavin, in particular, denied that the union committee had ever said that they would not bargain on pension. Flavin also suggested that Patrician still needed to talk to Grassi and they needed to work together on the cash (balance) fund.

As to the Company's prior mention of adding some percentages to the 20-percent increase in pension bands the final offer proposed, Farberman explained its absence from their final proposal by stating that they felt the Union was not moving on their five major issues and, therefore, they just did not add any more to the 20 percent. This reference to five major issues by Farberman is subsequently repeated orally, and in writing a number of times and becomes a leitmotif of the major differences in bargaining position between the Company and the Union which, the Company claimed, characterized their respective positions as the Company, more than a month later, declares, an impasse in bargaining and unilaterally implements the terms of its final offer. The five subject areas are pension, including 401(k), prepension, employee wages, health care for employees, and for retirees. While the Union agreed that these issues were crucial from the Company's viewpoint for resolution on its terms as a basis for its entering a successor collective-bargaining agreement, it also saw these issues as significant but noted that there were others as well, such as subcontracting, second tier wages and benefits and elimination of tier, meal money, and mileage payments, and overtime pay and equalization.

At this Thursday, February 29 session, Farberman also informed the union committee that he had a letter to the Union in which the Company was setting a deadline of Tuesday, March 5, to respond to its final proposal. When Palmer asked what if the Union were to call a membership meeting for Thursday, Farberman responded that if the Union needed to do that, they would consider that.

The union committee spent the whole weekend following February 29 working on the Company's final proposal and trying to come up with a counterproposal. On Monday, March 4, Flavin telephoned Farberman regarding questions the Union had on the Company's disability proposal. All union committee members and three company members, Farberman, Heftka, and Gail Noyes, participated through a speakerphone. The questions related to what benefits employees retained under the Company's proposal if they opted to retain current long-term disability benefits. The Company got back to the union committee the same day, by speakerphone, with answers to some of the questions, but could not respond on one item the Union raised, as to what happened on the 91st day under the long-term disability plan when employees had already received 67 percent of base salary for 90 days under the proposed short-term disability program. Flavin also informed Farberman that the union committee was spending the weekend at the union offices on the final proposal, had gotten their lawyers involved, and were waiting for a response from them on the legality of the company proposal to deduct workmen's compensation benefits from disability payments.

As noted earlier, the Union submitted a counterproposal in response to the management's final proposal on March 7. In a preliminary paragraph the Union recites it was making movement in over 29 discreet subject areas. Palmer read through the proposals, there followed some discussion, and then the Company caucused for about 3 hours. It will be recalled that in the face of the Company's final proposal the union demands included annual percentage wage increases and possible compensation and performance bonuses, 100-percent company coverage of basic health care for retirees after December 31, 1996, 100-percent coverage of new employees' Blue Choice monthly premium, present employee retention of current medical coverage, company match up to the first 6 percent of an employee's base wage contributed to the 401(k) plan, retention of the cur-

[2] The transcript reference to "alarmed" appearing at p. 431, L. 12, is ordered changed to "aligned" to accord with the actual language used by McGrath in attributing the statement to Farberman.

rent pension plan and adding the dollar equivalent of a discontinued prepension leave to the pension for employees with at least 20 years of service and 1/2 percent into their 401(k) for employees with less service.

After the caucus, the Company responded to union questions relating to company contributions to its single 401(k) plan as explained at page 17 of its Frontier Bulletin. The Union sought clarification as to statements at page 17 that indicated the Company would have the discretion to raise or lower matching contributions to the plan beyond 1996.

A portion of company minutes of the March 7 session were received in evidence and form the basis for what follows. Farberman responded that the company offer was not the benefit book (otherwise described at the Frontier Bulletin of October 1995). Farberman recited the company offer on 401(k) as .5-percent contribution to all employees and 100-percent match, dollar for dollar on the first 3 percent of earnings for 1996, but that match could slide up or down in future years depending on the profitability of the corporation. When questioned by Palmer about the Company's desire to achieve parity and the book's reference to the reservation to senior management of the right to change, Farberman again noted the 401(k) offer was what it was, the Union was not being asked to sign the corporate benefit book and there was no proposal permitting officers to change the 401(k). Farberman did acknowledge the Company wanted alignment and continued to seek it.

Farberman now stated the company team assumed the Union was rejecting their February 29 proposal. Flavin responded that you expected a counterproposal and we gave you one. When Farberman's statement that the February 29 proposal remained their final offer, and they had no more movement on that issue was met by Flavin's inquiry whether he was refusing to bargain any more, Farberman replied, in typical fashion, no, I will sit here and discuss any proposal that will bring you closer to our final offer so that you can embrace it. Farberman repeated that this was their last and final proposal and Flavin asked to continue to bargain on Monday (March 11), so that the company team could ask the union team questions on its proposal.

At this point, Farberman stated he wanted to give the Union an opportunity to have a discussion in order to embrace the Company's proposal. He asked, have you rejected based on clarifications or are you willing to accept our 401(k)? Flavin replied, only in a total package. Later, during his cross-examination, Farberman placed reliance on Flavin's statements made at the March 7 bargaining session as warranting his conclusion that the Union by the end of February was unwilling to enter any further tentative agreements pending a final overall agreement and justified the Company in not preparing any further such agreements. It is evident that Farberman's reliance is misplaced and he cannot be credited on this conflict. Flavin's comments here were limited to only one bargaining subject, the 401(k) plan, and even as to that subject Flavin was not accepting the proposal at this time but was willing to consider the Company's 401(k) proposal and perhaps agree to it so long as all other terms and conditions of a successor agreement had been resolved. The bargaining notes report of Flavin's comment is consistent with McGrath's independent testimony, that Flavin stated the 401(k) would be part of a total package when the parties came to an agreement.

As to future meetings, McGrath testified that while the Company continually stated they felt further meetings would be fruitless, that the Union was not embracing their proposal, the Union pointed out that it had just made a counterproposal which had major, major moves, that it included for the first time an indication of surrendering or giving up on the pension plan. This reference was surely to the union proposal in paragraph 20 expressing a willingness to discuss transforming the pension plan into a defined benefit cash balance account. The Union understood, but did not express in its proposal that the adoption of a cash balance account would result in a freezing of the pension plan. That, as a result, the Union was coming more in line with the company proposals. Flavin also noted that the Union was giving up prepension (but in an offer which, *inter alia,* added the dollar equivalent of such leave to the pension benefit for 20 years vested employees).

The Union said there was a membership meeting coming up and they would call when ready to meet again. The Company said it had no further questions, and Farberman urged the Union that if it had any further movement to make to put it on the table. Farberman noted that the Union had not addressed the major issues that had been pointed out to it, and, therefore, it should take the Company's final offer and change the date to March 7, 1996. The Union replied it had just provided a proposal, that it would continue to look, and if it could make modifications, they would be made. In particular as to the pension plan, when Farberman again threw up Patrician's and Palmer's earlier comments, Flavin again denied that the Union's bargaining committee had ever said it would never agree to a freezing of the pension plan and added "never say never."

After a caucus asked for by the Union, Palmer reported that the union committee had a conference call scheduled for the next day with Pierce and Bahr (Jan Pierce, vice president of CWA and head of its District 1 for CWA, and Morton Bahr, president of CWA, the International Union). When Farberman asked where do we go from here, Palmer replied he wouldn't know the answer until the conference call the next day with the higher-ups, that the committee needed direction from them, and then they would get back to the Company.

Before concluding, Farberman asked if the Union would be taking the Company's final offer to its membership. Flavin said this was the Union's business and to stay out of it.

The Union held a ratification meeting of its membership on March 13 at which there was almost a unanimous vote to reject the Company's final offer.

The next bargaining session was held on March 18 with the same bargaining teams in attendance. The Union scheduled this session to make sure the Company understood the members had rejected its final offer and to see if the parties couldn't embrace each other's proposals and achieve a settlement. Farberman said the company committee was there at the request of the Union and it was the Company's hope that the Union was there to accept their final proposal. He was willing to entertain any discussion that would help the Union embrace their proposal. Farberman said the Company was not going to be modifying anything. Flavin responded that the Union wanted to bargain. Farberman stated that he felt the parties were deadlocked, and the meetings were fruitless unless the Union was willing to move to the Company's final proposal. Farberman also used the term impasse to describe the parties' positions.

The union side indicated they were still looking at the Company's proposal and looking to see if there was any movement left on their side. Flavin noted that the Union was still working on another package and was looking to try and address the concerns of the Company. When Farberman asked if that proposal or package would embrace management's final proposal, Flavin replied we were still working on it and we didn't know. Farberman repeated his statements about the meetings now being fruitless unless the Union moved to the Company's position, again referred to the national union representatives telling him the Union would never give up the pension plan and therefore he did not think we were making any progress, and we were deadlocked, and at impasse. If the Union did not accept the Company's final proposal, the Company would be looking to impose conditions of employment on its members. Flavin denied the parties were at impasse, he felt there was still movement to be made and we should continue to meet.

Palmer noted the Company had not moved from day one on the major issues and that the Union was trying to embrace their proposal, and was preparing another proposal. With respect to Palmer's initial comments the record reflects that on February 28, March 27, and April 10, 1996, the Union filed four unfair labor practice charges against the Company. The first, in Case 3–CA–19917 alleged that the Company violated Section 8(a)(1) and (5) of the Act by ignoring the provisions of the expired contract governing the contracting out of work for the purpose of intimidating the Union to accept the Company's concessionary demands at the bargaining table. The second, in Case 3–CA–19972, alleged violation of Section 8(a)(1) and (5) of the Act by the Company by failing to negotiate in good faith and engaging in surface bargaining. The third, filed on April 10, in Case 3–CA20004–1 alleges a violation of Section 8(a)(1) and (5) of the Act by the Company by continually refusing to provide information necessary and relevant to collective bargaining. The fourth, filed on April 10 in Case 3–CA–20004–2, on the basis of which the instant complaint issued, alleges that since April 8, 1996, the Company has violated Section 8(a)(1) and (5) of the Act, by unlawfully declaring a bargaining impasse and implementing unilateral changes in the terms and conditions of employment of RTC employees.

On June 28, Sandra Dunbar, the Acting Regional Director of Region 3, issued a letter to David Mintz, counsel for the Union, dismissing all four of the charges, except a portion of the charge in Case 3–CA–20004–1, on which she determined to issue complaint. Acting Director Dunbar found insufficient evidence to support the allegations in the charges on which she refused to issue complaint. In particular, in Case 3–CA–19972, she found, inter alia, that, "while the employer stood firm on several proposals, including prepension leave, retiree healthcare, wages, pension plan and employee health care, the investigation revealed that the Employer did not engage in bad faith or surface bargaining, but, rather, in hard bargaining. *Lucky 7 Limousine*, 312 NLRB 770 (1993); *Larsdale, Inc.,* 310 NLRB 1317 (1993)." On July 11, 1996, in a 55-page submission to the office of the General Counsel, Union Attorney Mintz filed an appeal seeking a reversal of the acting Regional Director and a direction that complaints be issued on each of the dismissed charges. By letter dated November 29, 1996, addressed to attorney Mintz, Fred Feinstein, General Counsel, by Yvonne T. Dixon, director of the Office of Appeals, ruled, sustaining the appeal in part and denying it in part. He concluded that the Employer's April 8, 1996 declaration of impasse and implementation of its last offer raised 8(a)(1) and (5) issues warranting Board determination based on record testimony developed during a hearing before an administrative law judge. However, the allegations in the three other charges were denied substantially for the reasons set forth in the acting Regional Director's letter of June 28. Thus, after engaging in an independent review, the General Counsel affirmed the acting Regional Director's dismissal of the surface bargaining charge, among others. With regard to that portion of the Union's March 25, 1996 letter requesting information about sales discussions regarding the sale of RTC, the request which the Company had refused to honor and which formed the basis for the Acting Director's initial determination to issue complaint, the General Counsel noted that, as a result of the Employer having subsequently advised the Union that no sales discussions had taken place, this issue was rendered moot.

As a result of the foregoing determinations by the Office of Appeals, counsel for the General Counsel has been foreclosed from arguing in this proceeding, that the Company's determination not to deviate from fixed positions taken during the course of bargaining, among other conduct, could form a basis for claiming an unlawful premature declaration of impasse. The counsel for the General Counsel nonetheless argues that such conduct may be examined in the course of weighing the bona fides of the Company's conduct alleged as violative of the Act. This argument shall be reviewed infra.

Following a caucus called by the Union at the session on March 18, Palmer reported a belief that the parties were not that far apart on the Union's proposal for contracting out work and on the employment security language. On contracting out, the Union continued to seek a minimum 60-day advance notice of company intent to contract and that all such issues he brought to the joint bargaining committee. Here, McGrath recalled Farberman noting that both sides were close on the contracting out work language, and as long as there was a word here or there being changed without changing the content or intent they were getting close, but if we're that close, accept the Company's proposal. On employment security and operational effectiveness (the institution of a jobs bank program to avoid layoffs), while Farberman noted the parties were close, he suggested laying both proposals side by side, and if they were the same, then the parties had agreement. When Flavin asked if the Union had to accept the Company's proposal verbatim, Farberman didn't reply.

Farberman, while acknowledging that the union committee were honest people and had worked hard, exclaimed there was no further place to go, and the Union had to accept their final offer.

At this March 18 session, the Union made a further request for information, comprising the cost savings to the Company if the Union embraced its total final package.

Farberman again noted there was no flexibility on management's side. There was absolutely no movement from their final proposal. He felt that the memberships' vote reaffirmed the Union's rejection of the proposal. The Company was willing to continue to bargain if the Union would embrace the Company's final proposal. The union side responded that they were working on a counterproposal and wanted to meet again. Farberman repeated that the Union's counterproposal needed to embrace all of the proposals in the Company's final package. Farberman asked if the Union's counterproposal would include the 20 percent increase in pension bands and a freeze in the pension. The Union responded they were still working on their proposal.

By letter dated March 19, Farberman provided to Palmer responses to questions asked of management, noting that the submission completed the Union's request for information made at the meeting of March 18. In a 2-page attachment, the Company responded to the inquiry as to savings from adoption of its final package, listing with respect to each of the thirteen economic proposals contained in its final package, the savings to the Company from adoption of the package. In some instances, the Company noted that it had already provided certain information as to its costs through 1995, and provided it again, but that savings for future years could not be readily determined as they were subject to the number of additional hirings, how long employees remain on short term, and enter long-term disability, and whether the Company met its economic objectives.

By letter dated March 20, directed to John Tassone, RTC's director of human resources and operations, Flavin requested a resumption of bargaining on March 25. He noted additional modifications by the Union on Contracting of Work, Employment Security and Operational Effectiveness and the Sunday and Thursday schedule which should lead to agreement. With respect to the pension 401(k) proposals, in particular the Company's comparative schedules and interest rate assumptions, the Union posed a series of questions. Flavin asked the Company to compute, separately, its costs of funding over 30 years its 401(k), and the pension plan, for new employees having certain annual earnings and making a certain contribution at an interest rate of 7 percent, and the dollars available for the hypothetical employee on retirement under both investment vehicles.

Flavin went on to provide the Union's own figures, showing that even with the Company's 12-percent interest rate assumption, the hypothetical employee retiring after 30 years of service would enjoy a significantly greater return on the moneys invested retaining the current pension and 401(k) plan than under the Company's proposed 401(k) plan, and, thus, the new investment vehicle (dependent on a voluntary contribution) could not possibly compensate for what members presently have, although the Union was still willing to listen.

Flavin goes on to question the Company's public "take-it-or-leave-it" attitude and continually threatening impasse and refers to documents in his possession suggesting a company intent to provoke a strike. In spite of the foregoing, Flavin states the Union will continue to modify its proposals in an effort to reach agreement. While it believed the Company's conduct shows it is engaging in surface bargaining, it hopes to make progress to reach agreement.

The following day, March 21, Farberman replied to Flavin, reiterating management's position that negotiations are at impasse, and that the Union has made it clear in various ways, which he recites (and previously recited at bargaining sessions) that it is unwilling to accept management's final offer. Farberman repeats, they have no intention of modifying that offer and it is the best offer they are willing to make. Farberman makes clear again that at the heart of their final offer are the Company's proposals on the issues of pension, prepension, employee benefits, retiree health care, and compensation. The Company views the Union's shuffling of its positions on other issues meaningless in the face of its continued rejection of the Company's final proposal, in particular, the Company's demands on these five key issues.

While Farberman agrees to meet on March 25, he states nothing of significance will be accomplished if the Union is unwilling to reconsider its position, and if the Union persists in its rejection of their final offer, the Company is prepared to implement terms and conditions consistent with that final offer in accord with applicable law.

In the March 21 letter, Farberman reminds the Union that under the Company's final offer, employees who wish to take advantage of prepension leave must take their last day of work on or before April 13, 1996.

By letter on RTC letterhead dated March 22, addressed to fellow employees, Anthony Cassara, RTC president, informs them he is attaching a copy of the March 21 Farberman letter, which clarifies its position on the current status of contract negotiations and advising that those wishing a complete copy of the Company's final offer could call employee relations at a telephone number listed.

In a one-page letter dated March 21, Flavin asks Tassone for the total cost to the Company for a 3-year contract, calculated upon the last company offer, the terms and conditions of the recently expired contract, and the Union's most recent set of proposals, to be provided before Monday's March 25 bargaining session.

By letter dated March 22, to Flavin, Farberman responds to the Union's information request of March 20 with respect to the Company's pension 401(k) proposals, listing each of Flavin's questions in turn and answering them, with specific figures. He also attaches a two-page document generated by Grassi which provides the calculations for the answers submitted. Farberman argues it is evident from these figures submitted that an employee would enjoy a 27.36-percent higher benefit under management's proposed plan. He also urges that a 9-percent interest rate is more accurate than the Union's 7-percent assumption.

By letter dated March 27, Farberman requests once again of Palmer that all future requests for information be put through his office, as chief spokesman, reciting the recent multiple requests made by different union people and to different locations. By another letter of the same date, but addressed to Flavin, Farberman now responds to the Union's March 27 request made to John Tassone for three different total costs for a 3-year contract based on company and union proposals and also predicated on a status quo agreement, noting the three calculations are based on certain assumptions, employment levels and attrition rates. The Company's calculation based on the Union's most recent proposal exceeds the cost of its own last offer by between $16 and $17 million.

At the March 25 meeting, with the same committees present, Palmer explained why he was seeking the information requested in a March 25 letter he had written to Farberman. In that letter Palmer stated that Union was prepared to consider as an alternative to the pension plan either the employer's current profit sharing plan or an alternative one to be negotiated which needed to be based upon an ascertainable measure of the employer's profits, subject to verification and control. Palmer then requested information related to the current profit sharing plan, much of it for the last 5 years, to help the Union determine if amounts have been or will be generated for employees by the plan and whether or not the Company overpays management or allocates the same money into profits.

Tassone asked what was the Union's alternative profit-sharing plan and Palmer, according to McGrath, instead criticized the Company's bonus plans, on which it set all the dates and goals and regarding which the Union had no say but upon which goals employees were expected to base future earnings.

A lengthy discussion of the Company's 401(k) plan ensued, followed by a caucus called by the Company. Afterward, when the Company repeated the Union hadn't embraced freezing the pension plan, the union team responded it was in the process of preparing another proposal and was looking at the cash balance account and other options.

At this March 25 meeting, McGrath attributes to Farberman a comment that prior to this he didn't see where the Union was moving closer to the Company and now he could see the Union moving closer on one of the Company's five proposals, without identifying which one.

At some point at this March 25 meeting, the informal luncheon meeting among Patrician, Palmer, and management was discussed. McGrath was refreshed by reviewing company minutes that Palmer stated that at that luncheon his position had been that the Company's proposal was unacceptable to the Union at that time. Hopefully, the Union and Company would move from their positions as bargaining continued, and agreement could be reached.

Farberman asked the union committee to alert its members to the date by which, under the Company's final offer, prepension leave would be eliminated. With that in mind the Union sought an early April session.

By another letter also dated March 27, Farberman responded to Palmer's March 25 information request, referring also to a March 26 telephone conversation during which they agreed to modifications. In the remainder of the letter each question is listed, with either the Company providing the information or noting an agreement that the information is no longer needed, or the Union agreed to a withdrawal of its request. In a number of instances, Farberman notes that the information was not yet provided but would be provided in a certain form, e.g., stock prices for each month over the past 5 years, and the Putnam Plan Trust Agreement and 401(k) Plan Document, and minutes of the employee benefits committee where changes in the current 401(k) plan were discussed, if any.

There is no evidence or claim by the Union that the followup information was not timely provided.

Then, by letter dated March 29, and prepared on CWA District 1 letterhead, Palmer informs Tassone that after serious discussion among the bargaining committee members and with the National Union they have decided to submit a new comprehensive counterproposal to the Company, which will include two pension alternatives, one which maintains the current pension framework, and one which incorporates the Company's basic 401(k) principles. Palmer describes the letter proposal as freezing the pension plan, eliminating prepension leave and relying solely upon a single 401(k) for retirement benefits. Significantly, Palmer then notes, "While this new alternative proposal will incorporate the Company's 401(k) framework, the union must be confident that it also guarantees sufficient retirement benefits for our members." Because of needed time to prepare and meet with CWA's pension experts, Palmer asks to push back an April 1 meeting date, to April 8, to start at 9 a.m. and to block out the full day. Palmer also suggests engaging a mediator to assist and asks for Tassone's views.

Farberman responds to Palmer by letter of April 1, agreeing to meet April 8 at 9 a.m., and noting no objection to Union engaging a mediator from the Federal Mediation and Conciliation Service. But Farberman asks that such a mediator be fully briefed by the parties and review the bargaining history prior to April 8 so that our time on that date "can be spent determining if the Union is now prepared to accept our final offer." Farberman goes on to emphasize that a changed union position on pensions will not break the present impasse if it continues to reject management's position on the other key elements in their final offer, noting that the five key elements are spelled out for Palmer in his letter of March 21. Farberman warns that union concessions on April 8 which fall short of agreement to the Company's key demands will not break the deadlock and will force management to consider its other options under the law.

Palmer immediately responded to Farberman by letter dated April 2, decrying its negative and provocative tone, warning that any attempt to unilaterally implement its proposals on prepension leave or any other subject would be treated as unlawful by the Union, but notwithstanding the foregoing, announcing the Union's plan to outline a new comprehensive proposal for the Company's review. As to a mediator, Palmer suggested the parties immediately seek the services of a named mediator with the NYS Mediation Service as the quickest route to such assistance. Palmer notes the Union could probably not meet with a mediator before April 8, and, if the Company preferred such a preliminary meeting, it would agree to move the April 8 session to later in the week.

Apparently, Farberman and Palmer spoke on April 2, because Farberman, by letter of that date, confirmed his advise to Palmer that Jack Canzoneri, of the Federal Mediation and Conciliation Service, whom he noted is the designated FMCS mediator for the parties, had indicated his willingness and availability to serve as mediator as early as April 3.

The next and last bargaining session was held on April 8, with Canzoneri, the Federal mediator, present. This session was the first at which any mediator was present.

The Union first met separately with the mediator at approximately 10 a.m., reviewing the bargaining history to date, and went over its new counterproposal with him, noting all the changes it had made. Starting at noon, the union team presented its proposal to the company team. Palmer read the seven page document and attachment, which dealt with modifications the Union was proposing to the existing contract work article which it had now agreed to retain. New proposals included those dealing with contracting of work, job security (the Company's job bank concept), 401(k) plan, temporary employees, wages, upgrades, physical demotions, pension feathering, pensions, including prepension leave. Other unchanged March 7 proposals were also enumerated in this new comprehensive counterproposal. On certain of the terms, most unchanged from March 7, the document noted tentative agreement. These included vehicle assignment; vacation; meal, mileage and tier payments; tools; upgrades for two named employees as well as time reporting clerks; telephone discount; MDF; life insurance; Medicare B (on which the Union indicates it is withdrawing its proposal and agreeing to retain current language); temporary job classification transfers; grievance and arbitration; tuition; safety; recovery of overpayments; perfect attendance; meal money allowance; air pressure and clerical hours (on which the Union announces acceptance of company proposal); job bidding; apprenticeship program; and disability procedure.

Many of the differences between the parties that continued to remain on April 8, even after the new proposals were made, have been previously described.

In particular, in those five key areas where the Company's longstanding positions had remained firm and which the Company continued to insist that the Union embrace, significant differences remained. They included retiree health care, wages, pension and 401(k) plan, prepension leave, and employee health care (described in the Union's April 8 counterproposal as standard corporate benefits). The differences in these areas which existed between the parties as of April 8 have been previously detailed.

After reading the counterproposal, the company team asked questions. The union team asked questions regarding contract work and Sunday through Thursday work schedule and the Company responded. A half hour caucus then ensued. On the parties' return to the table Farberman said that they had received the Union's proposal, and that the Company felt that they were still far apart, and that there was no real movement by the Union to embrace the Company's proposal, and he felt they were at impasse. He added he would get back to the Union with their next step. When asked by Flavin or Palmer if the Company would be making a counterproposal to the Union's proposal, they were told, no.

When the Union side mentioned the movement they had made on the pension issue, the Company said they had not moved enough toward its proposal and didn't particularly like the Union's proposal, and since there was no movement toward the Company, there would be nothing forthcoming from them. When Flavin said that the Union had come with a proposal to give up the pension, and wasn't that enough for the Company, Farberman replied that they had not embraced his proposal and the Union's proposal was not enough. If you looked at the two proposals, the Union had not embraced theirs. Someone from the Union side commented that this was the first time its proposal had embraced the Company's concept of an actual bonus and was that not enough for the Company. The answer given was no, it was not.

Farberman stated that if one looked at the Union's proposals of March 7 and April 8, it had not matched the Company's. He also said there would be no further movement by the Company. Palmer now expressed the Union's feeling that they were not at impasse, that the Union had made approximately 29 major moves with its last two package proposals, and the parties were not at impasse. There was still movement that could not be made on both sides.

McGrath noted that at no point during the April 8 session, did the Company ask for a clarification or engage in any discussion regarding the contents of the Union's proposal. Nor did the Company provide any calculations that they may have made regarding the financial impact of the proposal that the Union had made.

A recess was now called by the mediator at about 2:10 p.m. during which he met separately with the Company. The union committee waited to resume the session until about 4 p.m. but there was no further face-to-face meeting. When the Union left the Holiday Inn where the session had been held, the Committee's conclusion was that another bargaining session would be held within a day or two.

No further bargaining session was scheduled or held. Instead, by letter dated the same day, April 8, Farberman informed Palmer that the parties were at impasse over the terms and conditions for a new labor agreement and that the terms and conditions of the expired contract would continue in effect at this time with certain exceptions. In the last paragraph Farberman noted that it was discontinuing enforcing article 5, section 1 (Agency Shop) and article 5, section 2 (Collection of Union Dues). In the middle paragraph, Farberman advised that effective immediately, the Company was implementing new terms and conditions of employment consistent with the Company's final offer dated February 29, 1996, and that a detailed description of these new terms and conditions as contained in the Company's final offer would be forwarded to him under separate cover.

In a letter dated April 9, addressed to its employees, new RTC President Denise Gutstein forwarded a copy of its April 8 letter declaring impasse and noting it had implemented management's best and final offer. Gutstein referred again to the Company's offer under the implemented terms providing employees until April 14 to take prepension leave if they leave work by April 13, and granting a 20-percent increase in the pension to employees retiring at this time or currently on prepension leave.

By letter dated April 10, Palmer responded to Farberman's April 8 letter, disputing the parties were at impasse, noting the Union had continued to bargain in good faith despite the appearance of bad-faith bargaining by RTC, and reporting that mediator Canzoneri, with whom he had spoken, would be contacting Farberman to discuss additional bargaining dates.

On April 19, Farberman informed Flavin that consistent with implementation of the final offer the employees would be receiving a 1995 Corporate Performance Bonus on May 9 payday. Farberman went on to explain how currently disabled and part-time employees would be treated under past practice. In a further letter of April 22, Gutstein informed employees of the pay for performance process which the Company had started implementing, holding out the prospect of a 3- to 12- percent potential bonus, and that the Company had begun the process to add new full-time employees.

During her cross-examination by company counsel, McGrath agreed that in her years of participation in bargaining, agreements were reached typically after 10 to 15 sessions rather than 40 to 50. She also agreed that on the subject of wages, the Union on March 7, 1996, sought parity with the wage package negotiated by the Union at NYNEX. McGrath further agreed that in her pretrial affidavit, a portion of which was read into the record, she referred to the five key elements which were the major issues in bargaining, as wages, prepension leave, the defined benefit pension plan and 401(k) plan, retiree health care and employee health plan. These were essentially the same issues which the Company had called key. McGrath however noted that other issues were also major to the Union's concerns. As to the five enumerated issues, McGrath affirmed as her testimony the portion of her affidavit in which she related the Company's demands in these five areas to what it informed the Union from day one were instructions by Frontier to make sure that the Rochester Telephone benefits were in alignment with the Frontier corporate package, and that there would not be a contract without that alignment.

Company counsel sought to bring out in his cross-examination of McGrath the movement the Company had made on these five issues over the course of bargaining. That movement had not been major. It included a modification of the percentage offered in connection with the bonus proposal, a limitation of the scope of the two-tier wage proposal to certain classifications of employees (but as McGrath pointed out there was no change in the Company's offer of no wage increase), a change in the health care proposal to provide a grandfathering option to current employees of retaining present medical coverage, an increase in the pension bands to 20 percent, and an extension of the provision for retiree health care from July 1 to December 31, 1996.

McGrath also acknowledged that with respect to the Frontier Benefit Book, in January or February 1996, in response to questions, Farberman told the Union that an agreement did not depend on adopting the Book. Palmer had also acknowledged during bargaining that the union committee understood that the Book was being used just as a guideline.

While McGrath noted that in its March and, particularly, its April 1996 proposals on wages, the Union was sending a message that it was prepared to accept a corporate bonus plan, she had to agree that these accommodations were conditioned on the Company also agreeing to provide a general wage increase.

McGrath did not know and could not provide the cost of transforming the prepension leave benefit for those eligible into a pension bonus. As to option A of the Union's April 8 pension and 401(k) proposal, McGrath agreed that it added a benefit—an additional .05-percent contribution into the 401(k) for employees with less than 20 years of service—not demanded by the Union on March 7. McGrath could not supply the cost of this change. As to the lump sum pay out of the vested individual employee's pension, or annual upward adjustment based on the CPI, contained in option B, neither could McGrath advise what these additional benefits added to the cost of its proposal. As to the Union's option B proposal in regards to the 401(k) plan of a guaranteed cash contribution of 6 percent of employee annual income plus a future contribution based on an amount sufficient to provide an annuity equal to the benefit of the current pension plan with an annual 10-percent increase in bands plus the annuity value of the employee's current accrued prepension leave, McGrath did not know whether these proposals were more or less expensive than the Union's package No. 1 on February 26. Neither did she ask for this information from the national Union which had prepared these figures.

McGrath also agreed that as to the key area of health care or employee health benefits, not only had the Company modified its final proposal to provide current employees a choice of remaining in their current plans or of opting for the Tel Flex package, the Union on April 8 opposed providing this option and continued to demand maintenance of their current coverage.

During her cross-examination, McGrath was also compelled to agree with her own notes taken at the meeting that at the February 26, 1996 bargaining session at which Ash replaced Palmer as union spokesperson and presented the Union's Package No. 1, in reply to Farberman's question, "Do you mean that unless I agree to keep the existing pension plan, then I will never see another proposal from you?" Ash replied, "Yes. This is a major issue that we don't feel we can ever get it ratified."

One of the Company's defenses to the complaint is that in its corporate campaign against the Company's final proposal, the Union was acting contrary to its stated position at the bargaining table of seeking to accommodate and negotiate a successor agreement and that its campaign rhetoric reflected its true position.

In a flyer dated March 21, described as a fact sheet, and signed by Flavin and McGrath as chief officers of the Union, the public was invited to show its support and attend a rally set for March 28 organized by the Union and supported by the Rochester Vicinity Labor Council, AFL–CIO and Allied Building Trades, and advertised to Save our Community and Stop the Attack on Working People, Wages and Benefits. On an attachment consisting of a series of pages, some of the Company's demands and the Union's counterproposal were listed, including their divergent positions on long-term disability, pension plan, 401(k) plan, wage increase, and health insurance for active workers and future retirees. In this document the Union clearly emphasized those issues it deemed most important and they substantially matched the Company's.

McGrath described the rally that was held as a show of support for the Union in their bargaining process to give the employees a morale booster. The inference is warranted and

McGrath agreed that by means of the rally and its corporate campaign generally, the Union was seeking to generate pressure on the Company from the public and the organized labor movement and its local constituents to modify the Company's final offer, as well as to buoy up the morale of the unit employees. In a tape recording McGrath made of a telephone message for members calling into the Union on Friday, March 29, the day following the rally, she estimated the attendance at the rally as between 1200 and 1500 and informed members that the purpose of the rally was to try to stop Rochester Tel from forcing a contract down the throat of the Union. She also agreed that on the tape recording she informed members who called the special number that the Company's contract proposal was so far out it would hurt every member and their families and would also hurt their community. By March 29, McGrath and the union committee were well aware that the Company was prepared to declare an impasse at the next bargaining session.

As late as April 1, 1996, Flavin was writing Pierce, the CWA vice president, with copies for Bahr, Ash, Palmer, and McGrath, seeking support and fast action for an additional budget for the Union's mobilization at RTC, and judging it of the utmost importance that they continue to put pressure on with their mobilization and media campaign. McGrath described the requested moneys from the national union as going for ads, rallies and in general, mobilization efforts. On the same date, April 1, Pierce faxed the CWA president a memo seeking a renewal of funds from the International Union for a continued media effort supporting the Union's contract talks with Frontier/RTC. He described the public's reaction to the media campaign, including TV, radio, and print message, as encouraging, including the approximately 1200 people in attendance at the recent Rochester rally. Among other devices, Pierce suggested creating new print messages geared towards the upcoming Frontier shareholders meeting on April 24th in Boston.

On April 4, in a bulletin addressed to and distributed to its 600 members, and described as "Bargaining Bulletin No. 4 Fairness to Families" and "Impasse," the Union acknowledged that the Company would very likely declare impasse and put in place its alleged final offer of February 29, in which event the Union would go to the National Labor Relations Board and to Federal court. A second page of the bulletin describes the Company's conduct to date, in canceling the contract, planning for a strike, taking the trucks and Company ID's away, employing extra security, among other acts, and ends up telling Jerry Carr, the company CEO, to go to hell. By letter of the same date, April 4, on union letterhead, Flavin forwarded a copy of the bulletin to all union's asking that it be given to their members and promising to battle the Company before the National Labor Relations Board, and in the courts.

When pressed whether by April 8, the Union still found unacceptable the Company's final proposal of February 29, McGrath testified that the Company's final offer was unacceptable, and that was why the Union made a counterproposal. Similarly, although the Union continued to reject the Company's position on the five key issues, it made its April 8 counterproposal in order to move closer to the Company's position.

During her direct examination by the General Counsel, McGrath noted that the union committee did not have the cost of its pension proposal on April 8 because the 6-percent figure had just been received from Patrician by telephone immediately prior to submitting it to the Company. Furthermore, usually, in the past, during bargaining the Company came back to the table and informed the Union what its proposals cost, but at no time in the 1995–1996 bargaining sessions, did the Company do this.

With respect to the subcontracting issue, on which the Union came much closer to the Company's position by April 8, but still sought additional protections against abuse not contained in the expiring agreement's letter of intent, McGrath testified she could not possibly supply the cost of its proposal because by April 8 the Company had still not provided the Union with the precise number of outside contractors it had been using starting in January 1996 and did not do so until the April or May timeframe. However, during the presentation of its case-in-chief, the Company produced and included in the record documentation of its having provided the Union in March with the numbers and associated cost of its utilization of contractors for the period January 10 through March 9, 1996. In a covering letter dated March 20 directed to Union Attorney Mintz, Heftka first disputes the Union's contentions that the Company's use of contractor's violates the expired agreement, [3] and that the Company's bargaining committee did not produce requested information regarding the issue of contractors raised by Ash on February 26. Heftka then attaches (1), a computer printout, providing activity, account code, work date and hours reported by employees of the contracting firms during the specified period and, (2), copies of invoices received from contracting firms seeking payment for hours worked by their employees. The series of pages comprising these materials appears to exceed 100.

During her re-cross examination, McGrath agreed that the proposals the Union presented in March and April regarding pension and prepension leave were formulated by the International. David Palmer the next General Counsel witness, basically corroborated McGrath regarding events and discussions at the bargaining table and the antecedents of union proposals. He testified that based on the fact that possibly half of the members of the bargaining unit could possibly be eligible for early retirement, in formulating bargaining proposals, the committee deemed both the pension plan and retiree health care as of particular importance to the union membership. He agreed that the Union's bargaining goals included obtaining a pay increase, strengthening the pension plan and protecting health and other benefits. Such goals conformed with the CWA pattern, in particular, of avoiding regressive terms. But Palmer denied that the terms or conditions provided by competitive employers played any part in the formulation of the Union's bargaining goals.

He reiterated that going into bargaining, the Company emphasized that two factors were driving its demands, a concern about local competition (as a consequence of the PSC adoption

[3] As previously noted the Union's unfair labor practice charge alleging failure to provide information as a refusal to bargain, was dismissed and the dismissal was affirmed on appeal.

of the Open Market Plan) and a desire to bring the contract at RTC in alignment with the Frontier benefit plan. As a consequence, the Company furnished early on the October 1995 Frontier Bulletin.

The Union concluded that as a result of how the Company had positioned itself with subcontractors, a strike would not be in the Union's best interests. Instead, a corporate publicity campaign, used by the CWA with other employers, was adopted as a part of the overall bargaining strategy with RTC.

Palmer confirmed McGrath's testimony that the Company's final proposal of February 29 was a wake up call, convincing the union committee that the Company was serious about freezing the pension plan (along with eliminating the prepension leave). A day or two earlier, when Palmer learned that the Company had been unwilling to make a movement on Package 1 at the session held on February 26 until they knew the contents of Packages 2 and 3, it became obvious to him that the Company was not willing to retain the current pension plan.

Palmer's recognition by late February of the Company's firm position on refusing to retain a continuing deferred benefit pension plan, was not reached without some chagrin. Although Palmer testified he anticipated an offer from the Company on February 29 he did not believe it would be a final offer. And after receiving it at the session, when Palmer learned from Ash at the caucus the Union immediately called, that he believed he had been lied to by Farberman in their private interchanges, Palmer and the union committee felt they had been misled. Nonetheless, they now realized the work they had to do in responding to the final offer.

In response to Farberman's February 29 letter establishing a March 5 deadline for the Union to respond, Palmer advised he was prepared to submit a complete counterproposal on March 7.

During the course of the successive bargaining sessions, when Farberman continued to assert that representatives of the Union had made it clear that they would not agree to the Company's proposals on both pension and other key areas, and they were hopelessly deadlocked, Palmer responded to Farberman that he didn't have to hear that again and referred to the Company's lack of movement from the first day of bargaining on those five key issues. Palmer was not asked and did not directly respond to Farberman's attribution of statements to Patrician and himself that the Union would never agree to freeze the pension. Palmer was asked about and did describe in general and conclusionary terms only, a meeting held in Rochester which he and Patrician attended, the purpose of which was for Patrician to be able to sit down with Grassi, himself, and Farberman and, he believed, Heftka and Tassone, away from the bargaining table, to discuss the cash balance scenario. This was the informal luncheon meeting previously mentioned at which Farberman described Palmer's conduct[4] in striking the wall and announcing the Union would never give up the pension. The Union told the Company the five key proposals were not acceptable. Privately, as Palmer commented, "Once we got to this point in time, it was obvious to us that we were going to have to make some movement in some of these five key areas, and that's what we were striving to do at this point in time." (Tr. 814.)

Palmer noted that it was not until the evening of April 7, that the Union's comprehensive counterproposal of April 8 was completed (except for the 6 percent figure added the following day). With respect to drafting the Union's pension proposal, containing both options A and B, Palmer explained that the problem was they were trying to put together a 401(k) plan which replaced the pension plan and CWA had not done that anywhere that they knew of. Paraphrasing Palmer here, fleshing out the substance of such a proposal took time. And the problem was compounded and added pressure arose from the union committee's knowledge that the Company believed the parties were at impasse and was going to shortly impose its final proposal. There were ongoing discussions with International pension expert Patrician, in Rochester prior to April 8, and by telephone on April 8.

At the conclusion of the face-to-face session on April 8, the Company announced they were at impasse and said bargaining was over. The Federal Mediator Canzoneri, after speaking separately with the Company, informed Palmer he would be in touch as to a further session. Later that evening, at his area office in Buffalo, Palmer received a fax of the company letter declaring the impasse and implementation previously described. Although Palmer referred to a contact with Canzoneri regarding additional bargaining dates, following his April 10 letter to Farberman, no such meetings were arranged or held.

Palmer believed that having just given the Company at 1 p.m. a proposal that for the first time had movement in agreeing to a single 401(k) plan as the pension plan for future employees, and then receiving a fax of a letter at 6 p.m. declaring impasse, the Company did not give the union proposal due consideration.

Subsequently, bargaining did not resume for another 6 months.[5]

Palmer explained that the Union's consideration of a cash balance account, resulted from information it received that the existing pension fund was over funded by approximately $3 million a year, generating these revenues in favor of the Company. In consultation with Patrician, the idea was explored of determining the value of each employee's share in the pension, establishing individual accounts in these amounts and distributing the balance of the money in the plan (the excess balance) and the money generated through investment to each such account for the future. According to Palmer, this concept of a cash balance account and the use to which the excess funds in the pension fund could be put on behalf of the employees, underlay part of the Union's April 8 pension proposal. Once the pension plan was frozen, as it was overfunded, the plan would not accrue any further liability. Any future revenues generated from the fund would be excess and could legitimately be ap-

[4] While the parties differed about who struck the wall, I conclude it was Patrician who did so, but that Palmer did not disavow Patrician's contemporaneous comments made at the meeting.

[5] Based on a representation by Respondent counsel, after bargaining resumed in the fall of 1996, and the membership rejected another company proposal following another resumption in bargaining, agreement was finally reached on a successor contract in early May 1997.

plied to the Company's guaranteed contributions to the single 401(k) plan as proposed by the Union and/or offset the added costs of retiree health care.

To assist the union committee in preparing its later proposals of March 7 (where it expressed a willingness to discuss transforming the pension plan into a defined cash balance account) and April 8 (when it proposed lump sum distribution of the value of then frozen pension benefit at the employee's option on retirement or separation), Patrician had prepared for Palmer and reviewed with him in Rochester sometime after February 20, a 20-page document. Prepared with the assistance of an actuary, the document contained columns of figures for each unit employee and purported to compare lump sum distributions of the present value of the pension benefit, based on age, years of service and pension band, at retirement, or age 65, each such employee would receive, with and without the 3-year reduction in age and service requirement proposed by the Company.

In spite of the foregoing explanation of the genesis of the Union's April 8, 401(k) proposal, Palmer admitted that the union committee offered no explanation or justification to the Company which might convince it to adopt the Union's proposal, other than what the Company could glean from the written proposal itself. A close study of the proposal itself shows no mention of an excess pension balance or of an application of such future balances to funding of company contributions into each employee's 401(k). Rather, the preliminary presentation in paragraph 21, before describing option A or B, makes clear that the Union wants to avoid reliance on employee contributions for the basic retirement benefit because of their inability to do so or because of the uncertainties of interest rates to guarantee the benefit. But the proposal does not describe how present or future company excess pension balances can be used to offset contributions the Union would impose on the Company with the "goal of guaranteeing a retirement benefit equivalent to the benefits that exist today" (GC Exh. 26, p. 4, Union Proposal, No. 21).

An analysis which Patrician provided to the union committee on March 20, only served to confirm the Union's view that on retirement, employees would suffer a significant diminution in their retirement annuity under the Company's proposal. Patrician compared a hypothetical employee with 30 years of service receiving an annuity under the Company's frozen pension plan on the on hand, and receiving a monthly amount based on a combination of 401(k) investment pay out, prepension leave, annual pension under the present agreement on the other. The difference exceeded $3000 annually. In preparing his figures Patrician used an average rate of return of 7 percent rather than the Company's 12-percent figure. The parties' differences in interest rates are reflected in letters previously described and exchanged between the parties in which the Union requests information and the Company responds during the period March 20 to 22. The same study also showed the adverse affects on an employee denied the Union demanded annual percentage wage increases over the life of a 3-year agreement and instead limited to receiving annual bonuses which do not add to base pay.

Again, while the Union used this study in preparing its April 8 counterproposal on pension/401(k) plan and wages, it did not inform the Company of its results, nor, as earlier noted, did it provide any rationale for its proposals.

By March 7, when the union committee saw the company counter its proposal of that date with its February 29 final offer, Palmer understood the Company had no intention of moving and the Union had to decide whether to move to the Company's position of a single 401(k) plan for retirement. Palmer talked with both Patrician and CWA President Bahr who emphasized the drastic step involved in moving, for the first time in any CWA negotiated contract, away from a defined benefit plan to a 401(k) plan and wanted members to understand that. As noted earlier, after preparing the Union's April 8 counterproposal the committee left open the guaranteed percentage figure for company contribution into the 401(k) plan, because Patrician had not yet supplied it. When he did, on April 8, he told Palmer this is about what you're going to need because there's some bad risk money here in a 401(k) plan.

When asked whether the Union was locked into the 6-percent figure Patrician supplied and the committee hand wrote into its proposal, Palmer replied it was not but he did not indicate any other figure the Union would accept. According to Palmer, the important factor is the fact that the Union was offering a 401(k) plan in place of the pension. Palmer also commented the Union was not locked into its April 8 wage proposal, which he noted was a half a percent less than its previous one. Until the February 29 company final offer Palmer believed, against the view of other committee members, that it was still possible to achieve an agreement on a general wage increase. Palmer did not explain why, as late as April 8, the union committee reasonably believed the Company would be amenable to a 10-1/2-percent wage increase over 3 years with COLAS coupled with a guaranteed compensation bonus over 2 years and a performance bonus payable after ratification, when the Company's final offer since February 29 had denied any wage increase and made both compensation and performance bonuses over the life of a 3-year contract conditional on achieving corporate performance and efficiency objectives.

Palmer did explain the Union's opposition to the Company's contribution to the 401(k) plan being in its own stock, that a sizable portion of the employees' retirement portfolio—both the automatic and the matching contributions—could be at risk because of the volatility of the stock whose share price, in the less than a year and a half since the hearing, was down substantially.

During his cross-examination by the Company, Palmer acknowledged that the positions arrived at by the Union at the bargaining table in March and April on the subjects of pension, prepension leave and retiree health care were formulated by the CWA International in conjunction with Local 1170. With respect to the amount of a guaranteed annual contribution by the Company to a single 401(k) plan, Local 1170 was relying on the International to supply that figure.

Palmer agreed that the Local Union had made it manifestly clear through statements of the local bargaining committee, representatives of the International Union and the membership itself through its vote rejecting ratification, that it was unwilling to accept management's final offer, as proposed. He also agreed that when Farberman said in his March 21, 1996 letter to Flavin that we have no intention to modify this final offer, this is consistent with the position taken by the Company beginning February 29 and in subsequent sessions. And he agreed that Farberman's statement in that letter that he had told the Union repeatedly it is the best offer the Company is willing to make, was also true. Nonetheless, Palmer expressed his belief that there was room for movement in the Company's final position. He was let to this conclusion by the fact that the Company continued to bargain after February 29, that the Company agreed to come to the table and hear the Union's counterproposal. But nothing else he could point to, no other action on the Company's part, contributed to his belief that company movement was possible. And Palmer agreed that several times Farberman had informed the Union that if it wasn't prepared to accept the Company's position on the five key issues, it was really meaningless to engage in further discussions.

Palmer insisted that although on April 8, the Union did not accept as written one or more of the Company's positions on the five issues, it moved toward acceptance of the 401(k) plan and the bonus structure, albeit in conjunction with a base pay raise. But Palmer was compelled to agree that when it continued to demand an across the board wage increase on April 8, as well as a bonus, it was telling the Company that as long as it gave a wage increase as specified in the Union's offer, the Union would also accept a bonus program. Palmer also agreed that even as of April 8 the Union did not communicate it was prepared to consider accepting an offer without an across the board wage increase, or only a bonus arrangement. Palmer also conceded the Union's wage proposal was more expensive than the Company's, and included a demand for guaranteed dollars in the bonus, unlike the Company's which guaranteed only a corporate performance bonus of $1000 for 1995 and only provided for a compensation bonus each year starting in 1997 conditioned on the Company meeting the performance objectives that it set for itself each year commencing in 1996. Later, on redirect examination, Palmer clarified that the Union's April 8 counterproposal as to the compensation bonus did not seek a guaranteed sum, but only specific dollar amounts conditioned on the Company achieving the threshold, standard and premier targets which the Company alone would set.

On retiree health care, a basic difference persisted between the parties on April 8, the Company proposing to stop 100-percent coverage of the premium for employees who retire after December 31, 1996, and the Union proposing to continue such coverage.

Turning to the differences as of April 8 on the pension and 401(k) plan issue, it was Palmer's contention that the future guaranteed company contributions the Union called for in its paragraph 2, option B proposal would come from investment income generated by the frozen pension plan and not from any increased contributions by the Company. Similarly, those employees who did not opt for a lump sum distribution of their frozen pension account on retirement but rather for an annual upward adjustment in their annual pension pay out based on the CPI, would have these increases generated solely by investment income in the pension plan. Palmer noted here that when the union committee inquired about the uses to which the Company intended to put the excess moneys in a now frozen pension plan, no answer was forthcoming. Palmer commented that without any further build up in liability over time which would have resulted from increased years of service, the excess moneys in the pension plan would continue to grow from investment income.

Palmer could not provide a figure representing the added costs to the Company arising from adoption of the Union's proposal under its option B permitting retirees to opt for a lump sum payment of the value of their frozen pension benefit. As for the 6-percent figure supplied by Patrician for insertion in the Union's option B proposal, representing the guaranteed cash contribution to be paid by the Company to the employee's individual 401(k) plan, Palmer had been informed by Patrician that this figure would allow an employee with 30-years of service to have a pension (retirement income) that was equivalent to the old pension plan. Palmer finally agreed that on April 8, the Company's final offer remained completely unacceptable to the Union's bargaining committee. But he maintained that the Union's counterproposal of that date had movement toward the Company's final offer such that the Union expected the Company would bargain and bring back a counterproposal.

Palmer also later clarified what appeared to be two separate 401(k) proposals set forth in the Union's April 8 counterproposal, at paragraph 8, and at subparagraph 3 of Option B of paragraph 21. They are basically identical. In each paragraph the Union seeks a company match of employee contributions, of 40 percent; then 50 percent and then 60 percent up to the first 6 percent of employees income, in each of the 3 years of an agreement, and into the Putnam Plan, which specifies that the company contribution shall be in company stock.

In its defense, Respondent called two witnesses. The first, Robert Merrill, had been director of product development and management for RTC from November 1994 through October 1996, before going on to other responsibilities, for strategic planning for RTC, and, more recently as carrier services director for Frontier. Previously, he had been director of regulatory affairs for RTC dealing with the PSC among other regulatory bodies. Before that, Merrill had been employed by AT&T during the mid-80s as manager of marketing and market analysis during the court ordered divestiture of its local exchange companies. As product manager for RTC he was responsible for all products and services, including product development, pricing, costs, and profitability.

He described the Open Market Plan which opened the local Rochester market to competitors for all local dial tone services. As a consequence of the PSC adoption of this plan, the Company anticipated significant competition in local telephone and related services, pressure on prices, and pressure on services. It was expected that local competitors would seek to steal away the Company's most profitable customers. Among its new competitors who entered the local market after January 1, 1995, were Time-Warner, AT&T, MFS, and Citizen's Telephone. Prior to that date RTC had been a regulated local service provider with a franchise right to service the local telephone service market. As a regulated utility, RTC was guaranteed a return on its investment and further was guaranteed to recover all its expenses through the rate hearing process conducted by the PSC. Now, new competitors could compete either by reselling RTC's network or by establishing their own network.

Furthermore, under the Open Market Plan, local exchange rates for residential customers were to be frozen for 7 years. In addition, over the first 3 years of the plan, local exchange rates were to be reduced by $21 million, almost 7 percent of the Company's annual gross revenue in Rochester. Of equal or even greater importance, the companies entering the field of supplying local Rochester telephone service, would be establishing price levels and service levels, as bench marks which Respondent would now have to attempt to meet. Effective January 1, 1995, the Company immediately started losing customers and access lines.

As a consequence of the foregoing changes in its status and the influx of competition, the Company focused to a much greater degree on cost controls, reducing expenses, and improved, more efficient and more productive customer service. Of particular significance, under the Open Market Plan, Respondent remained the provider of last resort, requiring it to service all customers in the area, including those it could not possibly service profitably, while its competitors, without such a requirement, could target, and attempt to skim off its highest profit customers first. This happened immediately when, as a direct result of American On Line switching to Time Warner as a provider of telephone and related services, the Company lost from its network almost $15 million minutes a month starting in January 1995. This loss continued to grow as more and more internet providers signed up for Time-Warner's services. Other Companies which left RTC and signed with competitors were Time Warner itself, Harris Beech, a leading law firm in Rochester, Genesse Hospital and the University of Rochester, all major customers who were among the Respondent's most profitable.

Merrill saw starting to happen in Rochester what he had experienced when employed by AT&T in the 1980s, where, after its breakup, over the course of the next 13 years, prices declined by a third and AT&T's market share in long-distance service declined from the high 90's percentile in 1984, to 60 percent today.

During his cross-examination Merrill testified he was aware that in 1995 the Company's profit margin was in the $75 to $100 million range and for 1996 it was that much or even more as a result of the Company's emphasis on growth. Revenues in 1995 were over $275 million, and in 1996 over $296 million. Merrill was further obliged to state that neither he nor anyone under his direction participated in formulating any bargaining strategy for the Company going into negotiations with CWA in October 1995, nor did he or anyone else under his direction prepare any analysis or documents for use in those negotiations.

Merrill explained that the competition in providing local exchange service in Rochester has taken two forms. In one form, a Company could install its own switch and provide sufficient facilities and thereby generate its own dial tone. To date, only one provider, Time-Warner, has taken that route. It is costly to install a switch and develop an infrastructure to support it. The other form is to approach the Company and arrange to purchase networks, at wholesale, and resell the Company's services at retail. All competitors to date, with the exception of Time Warner, have chosen this latter route, which is less capital intensive, is faster and has less risk. The Company thus has earnings which represent the buying of services from it under tarrifs regulated by the PSC which it did not have previously. To a certain extent, these earnings have replaced, albeit at a discounted rate, the earnings lost from retail customers. And the Company's competitors, by and large, have thereby become its customers. Furthermore, Merrill himself is not familiar with the activities of the marketing group whose focus has been to regain customers who have left the Company's network. Thus, Merrill could not say whether or not the Company has suffered a net loss of customers and access lines in the 2-1/2-year period since the adoption of the Open Market Plan.

Daniel Farberman testified that since December 1994, he had been the Company's personnel director of employee relations, his duties including administration for the two bargaining units in Rochester. He had previously been director of personnel for the City of Buffalo, responsible for collective bargaining, for approximately 1 year. Before that, he had been employed by General Motors Corporation for 12 to 13 years in operations and labor relations, including duties involving collective bargaining.

RTC, the wholly owned subsidiary now of Frontier Corporation since the changes brought about with the implementation of the open market plan, has continued as the company party to the collective-bargaining relationship with the Union, only its name having changed from Rochester Telephone Corporation to Rochester Telephone Corp. Frontier operates 29 other regional telephone companies across the United States. CWA represents two other bargaining units within the Frontier conglomerate, in Iowa and Minnesota, but Local 1170 of CWA (the Union), represents only the Company's unit employees in Rochester.

As the Company's chief spokesperson, in the 1995–1996 bargaining for a successor agreement, he and Mickey Ash discussed in early fall 1995 the advisability of beginning bargaining early. Farberman recalled specifically only one occasion when Ash attended the bargaining as union chief spokesperson, on February 26, when he replaced Palmer. According to Farberman, when Ash provided the company team with the singe page Union Package No. 1, describing it as the first of a series of three package proposals the Union had to present, he also stated that if the Company would not accept the Union's first package proposal in its entirety, the Union was not going to present any further packages to the Company. Farberman now asked, "Are you telling me that unless I agree specifically to what is stated here, I will not get any futher proposals from the Union?" Ash replied, that was absolutely correct. As will be recalled, Union Package No. 1 demanded the retention of the existing pension plan, with a band increase of 10 percent, and the transformation of prepension leave for those eligible into a pension bonus. As Ash was not called as a witness to rebut this testimony I draw an adverse inference that if he had testified he would not have disputed Farberman's testimony. *International Automated Business Machines, Inc.,* 285 NLRB 1122, 1123 (1987); *Greg Construction Co.,* 277 NLRB 1411, 1419 (1985).

McGrath, although called later as a rebuttal witness was not asked about these comments attributed to Ash at the meeting she attended. I thus credit Farberman's testimony. I note it is also consistent with other testimony given by McGrath, who described the Union's strategy going into the February 26 session, Ash's avoidance of a direct answer to Farberman's inquiry as to whether it was the Union's position there could be no settlement without the pension plan, and McGrath's own statement of the Union's position in late February to seek to maintain the pension plan or, if it could not, a plan that would keep the members whole and provide the same protection as the pension plan such as the cash balance account with a guaranteed return.

Farberman described the company decision to issue a final offer 3 days later, at the next bargaining session, as dictated by a series of factors, including Ash's ultimatum as well as conduct away from the bargaining table, such as the Union's and International Union's corporate campaign, all of which led the Company to conclude it had no more movement to make and that a final offer was appropriate to be issued.

Farberman denied that on or prior to February 26, 1996, he had said anything to Ash to suggest that he wasn't committed to the Company's position on the pension, i.e., to freezing it. As to McGrath's testimony that during a caucus at the next session on February 26, Ash told the Union Committee Farberman misinformed him that the Company was not going to make a final offer at the session, Farberman now recounted an unexpected meeting with Ash in the lobby of the Holiday Inn, Airport in Rochester where sessions were held, after the meeting of February 26 had broken up. Ash asked him where are we going next. Farberman replied he wasn't sure. Ash then asked whether or not he thought the Company would be issuing a final offer to the Union. Farberman said he did not know whether they would be doing that or not. In words that conveyed they were very close to the end of their rope, Farberman indicated he was going to have to confer with his superiors and colleagues before deciding the Company's next move. Based upon Farberman's presentation of this interchange, as well as his denial of any ambiguity about the Company's intention to freeze the pension in any prior exchange with Ash, neither of which Ash was called upon to dispute, see *International Automated Machines* cited supra, I credit Farberman as to each of them, and further, conclude, that Ash's purported reliance on private information he received from Farberman warranting a claim of surprise as to either the Company's negative reaction to his offer of Union Package No. 1 or to the Company's submission of its final offer on February 29, is not supportable on the evidence. Accordingly, I conclude that to the extent the counsel for the General Counsel places any reliance on the union misunderstanding of the Company's true positions in bargaining prior to and on February 29, 1996, its position is unwarranted and lacking in merit.

Farberman, who participated in the formulation of the Company's bargaining proposals (and then presented and defended them in bargaining) asserted that the open market and competitive realities of the open market plan were the significant driving force behind most of the economic proposals that the Company made. There was a changed competitive environment and significant downward price pressures and reductions in its revenue generating ability. The rate caps and freezing of rates were added factors shaping the Company's bargaining posture.

From the first meeting with the Union in October 1995 the company team spoke of new competitive entrants into the market, and factors shaping customer attitudes toward its role as service provider. With choice available to customers, they had to be convinced of the quality of service and fairness of the pricing. The Company brought in a number of presenters to inform the Union about the market factors facing the Company. They included presentations on identifying competitors, and their dual role as both customers and competitors, and their impact on profitability; studies on customer levels of dissatisfaction with the Company's inability to meet service goals of timeliness of repair and installation; the current performance indicia of the Company; near and long terms forecasts for profitability, revenue and income in both the prior regulated and current less regulated environment; and current changes in technology and their impacts on the Company and the industry.

During bargaining the Company presented wage and benefit surveys of Rochester area employers and specific area employers in telecommunications, as well as material comparing the Company's labor costs nationwide with IBEW and CWA represented employers and with its principal competitor, Time-Warner, which showed company pay significantly higher for employees performing similar work, and some common labor classifications among area employers showing similar results. As earlier noted, the union committee strongly disputed that the jobs cited were comparable. Farberman reported its nationwide surveys showed only one employer, NYNEX, with higher wages. Farberman also described to the Union, company fears of competitors skimming off its most lucrative customers.

As a device to improve customer service, the Company tied one of its compensation bonus proposals to a measurable increase in customer satisfaction. Its two-tier wage proposal was specifically designed to reduce its costs and improve customer service by permitting the hire of additional front-line service providers at permanently lower pay. The Company's response to union proposals to severely restrict subcontracting and require arbitration prior to contracting out, was to reaffirm its historic practice, to continue in place the letter of intent, and to offer its employment security proposal incorporating a jobs bank guaranteeing jobs to all employees displaced or laid off for other than disciplinary reasons.

Farberman claimed that the Union kept referring to contract terms it had at other employers. Both at the table and away the union committee insisted on following the negotiated pattern of settlements by CWA and affiliates at other employers. The committee members described the pattern as a pattern of negotiated wage increases approximately 10 to 12 percent a year, increased levels of pension benefits of approximately 10 percent, and no reduction of either current employee health care benefits or similar retiree benefits. When asked to provide a specific example of this conduct, Farberman mentioned the Union's wage proposal on March 7 and April 8, described as "the same as NYNEX". He also recalled both prior to and after Management's final offer, in response to his own question as to what the Union was looking for or what the Union needed to reach a settlement, Flavin responded "follow the pattern." He also referred to statements in Union Attorney David Mintz' letter of February 1996 to John O'Mara, chairman of the PSC, critical of Frontier for creating a crisis in Rochester for employees and customers by demanding unprecedented economic concessions as it pursues its goal of a "common denominator" national corporate wage and benefit package. In the letter, Mintz refers to the Union's goal in the current negotiations as seeking no more and no less than the pattern that has been negotiated and established by CWA and other unions in the region's telecommunications industry.

Farberman also pointed to quotes attributed to Jeff Miller, a CWA official, attributing the labor dispute in Rochester to the Company's insistence on bucking the pattern of negotiated settlements reached elsewhere by the CWA.[6] At a union rally in front of his office on February 22, he heard International Vice President Pierce say that the CWA would not stand for the Company bucking the pattern of negotiated settlements and was prepared to spend hundreds of thousands of dollars to teach this Company a lesson and to have it stand as an example to future companies who prepared to attempt to break the pattern of bargaining.

Farberman also described another instance when union functionaries including one who was not a bargaining representative, made statements showing an unwillingness on the Union's part to accept the Company's proposal to freeze the pension plan. These statements have previously been explored during McGrath's examination. Here, they are presented by a witness present at their pronouncements. As Farberman described it, a negotiation session had been scheduled for February 23 but was canceled by the Union. Previously, Palmer had explained at prior sessions that the issue of pensions was of major concern to the Union, to the extent that CWA President Bahr had a personal interest because of the potential impact the elimination for the future of a defined benefit pension plan would have on the CWA and other telephone companies, nationally. As a consequence, this issue in some respects was out of the hands of the local committee and was going to be governed if not entirely by the national CWA.

In preparation for the meeting on February 23 the Union had requested a significant amount of information regarding the administration and financial health of the pension plan and of the 401(k) plan, as well as the actuarial data and actuarial assumptions that were built into those plans. In order to facilitate bargaining on the issue the Company provided Robert Patrician, the Union's expert on these matters, with access to not only Robert Grassi, its in-house pension administrator (described as senior pension analyst in its Bulletin) but also a John Ponzini, an actuary and principal of Buck Associates, the Company's actuarial consultant and administrator of its plans.

The meeting of February 23 was to address management's proposals dealing with the pension and also to explore options the Union was going to propose, one being a cash balance account the Union had floated and was then exploring. The Company was going to discuss again a 20-percent increase in pension bands along within the freeze in the current defined benefit pension plan. However, upon arrival at the Holiday Inn, the company team, accompanied by Grassi, learned that the union team was unprepared to bargain that day. A suggestion was made to have lunch together, while Patrician was still in town, and at least have some discussion to further bargaining on this issue.

Present at lunch were Farberman, Tassone, Heftka, Grassi, Palmer, and Patrician. Both Palmer and Patrician declared the pension issue as very important to the Union, and the Company's proposal, on the table at the time, was simply unacceptable to it. Patrician made a fist, placed it up against the restaurant wall and said, "This is where we are, right up against the wall." Patrician took this to mean the parties would not be able to reach a negotiated settlement on management's proposal. Patrician told the assemblage that from the national union's point of view they were unwilling to deviate from the pattern established by the CWA in other negotiated agreements with regard to pension plans. Farberman could not specifically recall any comment on this subject by Palmer.

As Farberman went on to discuss the March 7 meeting, he testified that when he asked at some point after union presentation of its counterproposal, if the parties could clear peripheral items from the table, Flavin responded it was a package which rose or fell as one; no single item could be plucked out. Based on receipt in evidence of limited company bargaining notes from March 7, I have previously discredited Farberman's attribution of these comments to Flavin and found that the Union had not taken the position that tentative agreements could not be concluded pending final agreement. Yet, Farberman wished the record to reflect the conclusion that even if the parties were of a common mind on a proposal, e.g., one dealing with contracting out of work, it was the union position that the parties could not break this out and tentatively agree to it and put it off to the side. Not only did Farberman mistake the import and meaning of Flavin's remarks (see GC Exh. 114, p. 6 of the extract of bargaining notes and my comments at Tr. 1176) but his view was contradicted by items 3, 12, 16, 33, and 34 of the Union's March 7 counterproposal (GC Exh. 25A) showing tentative agreements reached on job security, upgrades for three clerks and plan to upgrade others, separation allowance, air pressure and clerical hours, and items 4, 14, 19, and 23 of the Union's April 8 counterproposal (GC Exh. 26) showing tentative agreements relating to overtime (with only five technical changes possibly remaining open), CES proposal, Medicare B, and Health and Welfare Fund.

Nonetheless, and in spite of the foregoing, the parties' practice of memorializing and initialing tentative agreements ceased after February 5. As explained by McGrath during rebuttal testimony, the Company, which had traditionally taken the responsibility for preparing and arranging their execution, ceased taking the lead on these matters. Farberman later opined that his interpretation of Flavin's March 7 comment resulted in the Company refraining from pulling out those issues which he acknowledged had been resolved after mid February and which

[6] Actually, Miller described as a spokesman for CWA, is quoted in the Rochester Democrat and Chronicle of February 6 as referring to Rochester Tel as going to challenge the Union on many issues in the expired contract and "try to buck the contract framework that we have throughout the rest of the industry . . . ."

had narrowed the gap between them, and preparing tentative agreements for initialing by the parties.

When he turned to the session held on April 8, Farberman responded emphatically that the Union's proposals in the areas of compensation and pension absolutely did not bring the parties closer to reaching an agreement. As he explained, first regarding pensions, in option B, while the first three sentences—offering to freeze pension, eliminate prepension leave, increase bands 20 percent and reduce eligibility requirements by 3 years—appeared to conform to the Company's own final offer, it was the subsequent related demands and conditions which showed a wide and, ultimately, irreconcilable difference which could not be narrowed or eliminated. The fourth sentence, providing an option of lump sum payout for retirees instead of the normal staggered annuity payments, significantly increases the cost of the employer's administration of the plan creating a significant additional expense for the Company. Farberman was already aware from prior discussions with the Company's actuaries and pension administrators in preparation for bargaining that a lump sum option was cost prohibitive. In the fifth sentence, by adding an upward annual adjustment in the frozen pension benefit based on the CPI for these employees who do not opt for the lump sum payment, the Union's proposal unfroze the pension to the extent of measurable increases annually in the cost of living, contrary to the Company's proposal to eliminate all growth in the pension plan and future costs associated with such growth.

Farberman denied the Union's claim of overfunding of the pension and the availability of excess monies sufficient to fund these additional benefits. While the fund through investment generated enough moneys to offset management's yearly contribution to the plan, it did not have sufficient monies beyond its maximum liabilities to warrant being considered overfunded under ERISA criteria. Furthermore, with the Company's proposed 20-percent increase in pension bands and 3-year reduction in eligibility requirements, there was not currently sufficient moneys in the plan to sustain it into the foreseeable future with no growth either through investment income or Company contributions.

As to the 401(k) plan, the Union's proposal, while it recognized the dual income streams of matching contributions as well as unmatched contributions, just as had the Company's, demanded significantly greater matching contributions of a significantly greater annual employee contribution, now 6 percent of annual income instead of 3 percent, as well as a significantly greater contribution independent of employee contribution, now 6 percent instead of .5 percent of employee income, which would be guaranteed by the Company for the length of the employee's service. In addition, contributions would be required in future years to guarantee a return equal to a 10-percent annual increase in bands as applied to the value of the current pension plan plus the annuity value of any employee's currently accrued prepension leave. Farberman concluded after having the proposal read and explained by Palmer, breaking, reading it again, and discussing it with his committee, that this proposal was regressive and added significant expenses to the Company.

As to the Union's compensation proposal, its demand for a general wage increase of 10-1/2-percent spread over 3 years remained unchanged from March 7, and, it sought, in addition, the bonus program which the Company had sought to substitute for a general wage increase. Also, the Union, contrary to the Company, demanded set bonuses for 1997 and 1998 provided the company targets were met. As characterized by Farberman, the combination of wage increase and two forms of bonus, the other being the $1000 performance bonus payable in 1996, clearly created significant additional expenses for the Company.

As early as March 7, Farberman testified that after reviewing the Union's proposal of that date, he informed their committee that they had failed to embrace the Company's five key issues and its final proposal in its entirely. The Company was at the end of the process and had no more negotiation room to move. By March 13, when the union membership overwhelmingly rejected the Company's final proposal, Farberman now concluded that negotiations were at a state of impasse. As Farberman explained, he had been repeatedly told by the Union's bargaining committee, by representatives of the National Union and now by an overwhelming vote of the local that the Company's proposal was completely unacceptable to them and at no time would they accept it. And, Farberman added, he believed them.

Still, the Company agreed to meet to receive and review the Union's counterproposal it intended to submit. A scheduled meeting for March 18 was not held. At a meeting held on March 25 the Union asked for time to submit a proposal on April 1 but that meeting was canceled by the Union and the parties did not meet until April 8. In a series of letters to the Union during this period, which have been previously described, in particular, his letter of March 21, Farberman reiterated the Company's position that it did not intend to modify its final offer and thus the parties were at impasse, and, further, spelled out that continued rejection of the Company's proposals on the five issues at the heart of its final offer which he then listed could lead to its implementation. In a letter of April 1, Farberman informed Palmer that on April 8 "A changed Union position on the issue of pensions will not break the present impasse in negotiations if the Union continues to reject management's position on the other key elements in our final offer." Farberman then referred to his spelling out those key elements in his letter of March 21.

Apparently without the knowledge of the Union, a day or two prior to April 8 the company committee met privately with the Federal mediator. On April 8, after the Union's presentation, there was a break and the parties caucused separately. The company team reviewed the union counterproposal and with particular attention to those proposals which deviated from its own, among them the pension and compensation proposals just discussed, attempted to affix the costs beyond management's final offer. The Company already had prepared spread sheet tables showing what 1, 2, and 3 percent wage increases would cost. As to the Union's option B pension proposal, the Company had previously investigated the possibility of a lump sum option in the pension plan and had asked actuaries Buck Associates to provide a rough idea of related expenses. As a consequence, Farberman had a good estimate of such expenses even without having in his possession the exact numbers. They totaled $5 to $7 million up front and an additional one half to three quarters of a million dollars a year, every year. As to the guaranteed 6 percent cash contribution to the 401(k), it was easy to make a rough calculation based on payroll costs of approximately $28 million over the life of a 3-year contract. Farberman calculated the cost as $580,000. annually. The Union's matching proposal also added additional costs beyond the Company's own more limited matching grant. As to the Union's option A, its prepension proposal added costs whereas the Company's had none.

Following the caucus, the Company returned to the main meeting room with the mediator present. Farberman explained they had reviewed the Union's April 8 proposal and found we were hopelessly deadlocked. We had issued our best offer, and we are not prepared to move any further. Farberman said he believed the negotiations were at impasse. He did not know what their next steps would be, and he would advise the Union. In response to Palmer's inquiry, Farberman said the Company did not intend to issue another proposal to the Union and that it had issued its best and final offer. We were at the end of the line, and negotiations were at impasse.

In justifying the conclusion of an impasse, Farberman pointed to the wage issue, where the Union had never wavered in it demands for a general wage increase; the two-tier wage schedule, which the Union continued to oppose; the Union's continued opposition to Tel Flex for (new) employee health care; its unwavering and conflicting demand for 100-percent coverage of basic health care for retirees; the Union's insistence on qualified employees receiving either the equivalent of prepension leave as an additional pension benefit under option A, or having their 401(k) account reflect, in part, the annuity value of the employee's currently accrued prepension leave under option B; and the Union's April 8 attachment of unacceptable conditions to an ostensibly frozen pension plan which were cost prohibitive and contrary to the Company's proposal and its philosophy.

During his cross-examination by the counsel for the General Counsel, Farberman described the pattern which the Union was insisting on was a status quo or continuation of the current level of employee wages and benefits and retirement benefits currently enjoyed by represented members at RTC or elsewhere within the CWA, regardless of the level of benefits. While the Union never presented any fact sheets summarizing the terms and conditions of employment in the four categories of wages, benefits, pension and retiree benefits in place under agreements with other employers, they did identify employers who made up part of the pattern as NYNEX, Bell Atlantic, and AT&T. But the Union did not suggest these three companies had the same or different levels of benefits in the four categories. When the General Counsel asked how Farberman could determine the pattern from varying benefits for employees at each of the three employers, Farberman answered he was told by the Union that the pattern in this situation was no change in the pension plan and a 10-percent increase in the bands.

Farberman knew NYNEX did not have a current contract, and he had not reviewed labor contracts with the other two employers. Yet he did not ask the Union for them.

As for the Union's wage demand of March 7 and April 8, characterized as "the same as NYNEX," Farberman knew this was a lesser demand then the Union's initial demand of 5 percent yearly. Thus, in its initial demand the Union was apparently not seeking to maintain a pattern with the NYNEX agreement. Also, by demanding bonuses on April 8, the Union was clearly demanding more than the pattern. As a consequence of these changes, Farberman wasn't sure what the bottom line was in terms of a pattern. But Farberman continued to insist that as to wages the Union's 10-1/2- to 12-percent demand was in conformity with the CWA pattern of a 10 to 12 percent wage increase over the life of a 3-year contract.

To support his claim that the Union was seeking benefits previously negotiated elsewhere, Farberman pointed to the Union's demand to retain without change the current retiree health benefits, which appeared to track the CWA's achievement at Bell Atlantic, where, as a consequence of a successful corporate campaign the Union was able to change Bell's position and obtain an agreement for no change in retiree benefits. However, Farberman was compelled to agree that by demanding 100 percent of retiree present traditional Blue Cross coverage or 100 percent of HMO coverage paid for by the Company, the Union was seeking a change from the prior coverage which had been company payment of basic coverage and member payment for a rider package at the member's option. This change was also, in Farberman's view, a deviation from the so-called industry pattern.

In spite of Farberman's understanding of the Union's reliance on maintaining a pattern in its demands made on the Company, he never sought from the Union a breakdown of the components of the pattern to which the Union was referring and he could not relate the Union's demand for achieving the "pattern" to any particular geographic location, in particular, with respect to AT&T which, he knew, operated nationwide.

As to the Company's declaration of impasse and decision to unilaterally implement its last offer, Farberman explained that following the close of the April 8 session, he and the Company bargaining team consulted later that day by telephone and in person with members of senior management and a collaborative decision was reached that was unanimous. Quite a few prior consultations had also been held after February 29 concerning implementation of the final offer. It was agreed that if the Union failed to embrace the Company's final offer it would implement, but when was left open. It was also agreed that the company team would update management at the conclusion of each bargaining session.

As to the company decision not to extend the contract beyond January 31, 1996, Farberman explained that the Company was attempting to achieve a fundamental change in the way it had been operating its business. In such circumstances, sending a signal to the Union that they were willing to continue the status quo indefinitely would not have furthered the process of change.

Farberman also saw no inconsistency in Patrician insisting at the informal luncheon meeting on February 23 that the Union would never accept the Company's proposal to eliminate the pension plan, and also suggesting company consideration of a cash balance account in place of the present retirement system. Patrician's and the Union's objection was to the freezing of the pension as it was proposed, and not including future employees in the plan and relying solely on the 401(k) plan and with a minimum company contribution for their retirement benefit. One could thus conclude that Patrician's goal in looking into a cash balance account was to provide a uniform investment vehicle for all present and future employees, such that the present value in the pension account for each vested employee would be retained and future employees would be able to achieve a form of parity through a 401(k) plan. Looked at this way, the Union's April 8 pension and 401(k) proposal in option B seeks to achieve these same objectives, by retaining the value present employees had achieved and would be expected to continue to achieve in the existing pension plan, but now achieved in the form of a guaranteed company contribution to a single 401(k) plan which would be required to generate the same values for each employee as an ongoing defined benefit pension plan. Under such a proposal, Patrician could readily approve the freezing of the current pension plan. Whether this concept exhibited sufficient movement in the Union's position on April 8 such that the Company would be required to explore its ramifications and the Union's willingness to move or concede further is the central issue in this case.

In Farberman's view, the Union's April 8 counterproposal sent him a signal that if the Union was going to go down the employer's road they would make it extremely expensive for the Company. On April 8 Farberman did not believe that the Union in offering its April 8 proposal was attempting to close the gap between the parties in negotiations, even though he also believed the Union was at the table for the purpose of reaching a collective-bargaining agreement and, further, that the Union believed on April 8 the parties were not at impasse.

As Farberman described them, the Company's goals in entering bargaining were to effectuate a fundamental change in the way it incented, compensated, and motivated its employees. The Company was facing a radical change in its business environment both with respect to new competitors and with respect to price. Structural changes were needed in the way it conducted its business. It needed to hire more employees, and to align the goals and objectives of its employees so they focused on providing superior customer service. A main focus was on controlling expenses, increasing revenues and profitability in a shrinking market which clearly had restrictions on prices.

As for the Company's selection of a single 401(l) plan as the sole form for future employees retirement protection, Farberman saw some economic advantage long term in moving from a defined benefit to a defined contributions scheme, but its primary objective was in giving employees some stake in the future continued economic health of the Company. Under the Company's 401(k) proposal, besides the traditional corporate match, employees received employer contributions made solely in company stock and which would vary in the future depending on the growth and profitability of the business, thus having the economic well being of the corporation and its staff of employees rise and fall together. The same objective was made manifest in the Company's compensation proposal, where the size of future employee bonuses were made dependent on both the corporation and the employees achieving set goals in the areas of efficiency, productivity, and customer relations and satisfaction with respect to one set of bonuses, and dependent upon the Company's profitability as to other.

When the counsel for the General Counsel sought to explore the meaning of the use of the term "alignment" by Farberman, he merely repeated the formula of seeking to align the goals and objectives of all of their employees so they focus on the common objective of providing superior customer service. In doing so, he clearly avoided a direct answer to the question as to whether alignment between terms or conditions for this bargaining unit and other groups of employees was a bargaining objective of the Company (Tr. 1348–1349). This, in spite of the fact that, as this Decision has earlier noted, the Frontier Bulletin repeatedly stresses the goal of aligning the compensation, benefits, retirement income and other terms and conditions of employment of all Frontier employees.

Later, while undergoing cross-examination by union counsel, Farberman was obliged to concede that at the bargaining session held on February 26, he informed the Union in discussing the pension plan and changes in proposals, "short term is a cost to us. It is not an economic issue. We are doing it for alignment and focus. Potentially in the years ahead it may save."

In describing the company team's prior consultations about lump sum payouts of pension benefits with Buck Associates, Farberman noted that the consultant had advised that a single cash sum payout as sought by the Union in paragraph l of its option B pension proposal was the most expensive variant of how a lump sum benefit could be structured.

When pressed, Farberman explained that had the Union embraced 95 percent of the Company's final offer, they would have had to take a close look at it. When questioned whether, as a result of the retirement of 200 of the most senior employees, roughly a third of the unit, by April 1996, the Company had reexamined its focus on the key issues of pension and retiree health care, since the new retirees were now locked into the Company's newly implemented retiree benefits and no longer part of the unit, Farberman said he didn't believe there had been. His multiple answers here show either an unwillingness to reexamine bargaining positions in light of a significant shift in unit demographics or to respond directly to the question. (See Tr. 1355–1356.) In either case they support a judgment that, with respect to the goals the Company was seeking to achieve in bargaining, the goal of obtaining uniformity and alignment of the Company's employees with all Frontier employees' key terms of employment, was probably the most significant motivation for adopting the proposals the Company offered in February 29 and to the end of bargaining, of even greater weight in the Company's thinking then its responses to the new competitive pressures its witnesses described. As noted earlier, while it would be unlawful to impose the benefits described in the Bulletin on employees covered by a collective-bargaining agreement, and the Bulletin precludes it from doing so, once an agreement has expired, the Company could seek to impose the uniform compensation, employee and post-retirement benefits package contained in the Frontier Bulletin, provided it had bargained to impasse over its demand to introduce them, as it is seeking to do in this case.

Another way of analyzing the Company's conduct here is to look at the themes of alignment and responses to the new competition as really forming a single goal or interrelated goals. In adopting the Tel Flex benefits program, bonus compensation, staffing principles, 401(k) plan and the like, Frontier itself, which had recently doubled in size, through mergers and acquisitions, within 6 months of the PSC's adoption of the OMP, had selected a benefit program designed for a competitive environment in which efficiency, seeking competitive advantages in the market place, and cost savings resulting from uniformity, were hallmarks, and was only seeking to integrate its wholly-owned subsidiary, Rochester Telephone Corp., into this new system. To the extent there were costs, deemed either excessive or undetermined, which deviated from those contained in Frontier's benefit package, they would not be acceptable under Frontier's competition driven philosophy.

Under further Union cross-examination, Farberman agreed that on March 7 he stated to the union team, that he had (previously) asked the question whether, under no circumstances, under no scenario, would the Union agree to the Company's proposal, specifically pension, to freeze the pension, and the answer he had received from Ash, Patrician, Flavin, and Palmer, was no. When now asked whether the Union had not on April 8 provided a proposal in which it did agree to freeze the pension, Farberman replied that he viewed that proposal as not a pension freezing. Implicit in Farberman's answer, is his earlier testimony that by providing for a lump sum pay out, or an upward adjustment in periodic pay out based on CPI, not part of the existing plan, the Union was adding significant costs to the existing pension plan that were not comprehended in the Company's final offer, and by providing for a guaranteed 6 percent or greater contribution to the 401(k) plan, to be measured annually by the benefit value of the current pension plan, the Union was seeking to provide employees with the equivalent of the benefits they would have otherwise received but for the freezing of the pension plan, well in excess of the costs associated with that plan or the 401(k) plan which the Company was willing to provide in its final offer.

Farberman also explained that RTC had petitioned the PSC for approval of the Open Market Plan in order to free itself from regulation of its out-of-state operations through the creation of the holding company structure, the establishment of Frontier Corp. as that holding company, leaving the way clear for Frontier's growth through mergers and acquisitions. This goal was achieved, but at the cost of the opening up of the local Rochester telephone exchange market to competition.

In that market, to a certain extent, the Company has become a wholesale company selling portions of its network to other companies, thereby avoiding the creation by them of their own networks, and assuring that it still maintains a certain monopoly over telephone exchange network in the Rochester area. Furthermore, once there was implementation of the open market plan, there has been a growth in the Company's access lines primarily because of higher demand for such secondary exchange services as voice mail, fax, computer and related services.

Farberman conceded that the Frontier Bulletin was used in bargaining—contrary to Farberman I find the company provided it to the union team—and that it was the best description of some of the terms that the Company was talking about and the best source of information on some of the changes it was proposing. However, Farberman argued it did not contain company proposals. I am unpersuaded by Farberman's denial. It is evident that a number of significant company proposals, among them, the five key issues, mirror Bulletin provisions, including Tel Flex managed care,[7] except for dental and vision coverage, disability income benefits, fixed base pay and the 1995 bonus program, the phasing out (freezing) of the defined benefit pension plan including the specific plan amendments designed to ease transition, introduction of a single 401(k) plan and a baseline company contribution of .5 percent as well as a matching company contribution up to 3 percent of employee contribution.

Also contrary to Farberman's earlier denials, I find that he spoke with the Union about the Company's desire to achieve alignment with the Frontier wide benefit program. Finally, Farberman did concede that "we were seeking to commonize employees' compensation and benefits to enable all employees to be focused on a common goal" (Tr. 1389). By "commonize," Farberman meant to have all employees in the same or similar Frontier programs and policies. (Tr. 1390.)

During his redirect examination by company counsel, Farberman was asked whether he believed there existed the possibility of additional movement on the part of the Union, at the point when, after reviewing its April 8 new counterproposal, he told the Union the parties were at impasse. Farberman responded that he believed the Union may have had more movement or shuffling of positions, but he also believed firmly because they had told him this many, many times, that they were not going to make movement to embrace the Company's positions on the five key issues. And movement surrounding or on the periphery which had already been made or could still occur would not have been satisfactory or meaningful so long as it did not embrace the Company's five key issues. Not only had the Union not said anything between February 29 and April 8 which led him to believe they were prepared unconditionally to accept the Company's position on any of the five key issues, to the contrary, they had told him they would never agree to it. As further indicated by Farberman, there was no statement from the Union on April 8 that led him to believe the Union's counterproposal was simply an interim proposal and another more generous proposal was right on its heels.

Discussion and Analysis

The complaint alleges that on April 8, 1996, Respondent prematurely declared its negotiations with the Union had reached an impasse and unilaterally implemented its last bargaining proposal, including changes in the areas of wages, pension and prepension leave benefits, employee and retiree health care for current employees, in violation of its bargaining duty under Section 8(a)(1) and (5) of the Act.

[7] One deviation was the Company's final offer to permit current employees only to retain their current health care benefits.

An employee who would otherwise be held to have violated his duty to bargain by instituting changes in existing terms and conditions of employment when negotiations are sought or are in progress, *NLRB v. Katz,* 369 U.S. 736, 741–743 (1962), is free to introduce such changes when the negotiations reach an impasse, provided those changes have been previously offered to the union during bargaining. *Huck Mfg. Co. v. NLRB,* 693 F.2d 1176, 1186 (5th Cir. 1982). Inasmuch as neither party is required to "make concessions or to yield any position fairly maintained "in collective bargaining, *NLRB v. Blevins Popcorn,* 659 F.2d 1173, 1187 (D.C. Cir. 1981), impasse is "a recurring feature in the bargaining process," *Charles D. Bonanno Linen Service v. NLRB,* 454 U.S. 404, 412 (1982*)*. Witness the apparent fact that the impasse being disputed in this case was broken and an agreement reached over a year later. That later event cannot be introduced in the instant proceeding to shed light on the nature of the impasse reached on April 8, 1996, or earlier. *Hayward Dodge,* 292 NLRB 434, 470 (1989).

"Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is a disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed." *Taft Broadcasting Co.* 163 NLRB 475, 478 (1967), petition for review denied *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The Board in *Taft* defined such an impasse as being reached after good-faith negotiations have exhausted the prospects of concluding an agreement. The reviewing and affirming court (Leventhal, C.J.) commented that the Board's finding of impasse reflects its conclusion that there was no realistic possibility that continuation of discussion at that time would have been fruitful, noting further that this is a sound standard of deadlock, *AFTRA v. NLRB,* id*.* at 628 and fn. 17.

Preliminarily, each party seeks to impugn the good faith nature of the negotiations engaged in by the other. In its affirmative defense, the Respondent claims that in reciting the pattern it wished the Company to adopt, in generally describing that pattern, and by referring to its wage proposal as being the same as NYNEX, the union negotiators and attorney were insisting to impasse on a permissive subject of bargaining, thereby suspending the Company's duty to bargain. Unlike *Borg Warner Corp*., 356 U.S. 342, 351 (1985), *Chicago Tribune Co.,* 304 NLRB 259, 260 (1991), and *Electrical Workers Local 135 (La Crosse Electrical*), 271 NLRB 250, 251 (1984), cited in support by Respondent in its brief, none of the Union's demands were about permissive bargaining subjects. The multiple references included a number made away from the bargaining table by nonnegotiators, and even those made by negotiators could just as easily be viewed as a way of informing the Company that the Union wished to maintain traditional advances in benefits in the telecommunications industry in general and with RTC in particular, as the sinister interpretation Respondent would place on the use of those phrases. The inclusion of the NYNEX wage settlement language in the March 7 and April 8 proposals can also be reasonably viewed as descriptive of a wage package to which a company competitor in a close geographic market agreed, thereby reinforcing the demand as being reasonable for this employee. Other than this single instance, the record contains no evidence of any written union proposal referring to or relying on particular terms or conditions in other units. To the contrary, many of the Union's bargaining demands, particularly in the subject areas which it deemed important, were unique to the RTC unit, and a number grew out of, or modified past contract terms and addressed real concerns the Union voiced about the needs of unit employees.

For its part, the Government argues in its brief that a shifting rationale for its insistence in the five key areas, first a reliance on alignment, but later one based on economic considerations, as part of a predetermined course to impose its new corporate vision, undermined the Company's bargaining stance and bona fide claim of achieving an impasse and evidenced a lack of "good faith" in bargaining. The evidence fails to support such an argument. Farberman testified and the union witnesses did not dispute that at early bargaining sessions the Company sought to impress upon the union team the significance of changed market conditions in which the Company for the first time faced serious competitive pressures on costs, services, and earnings. Later, at times, especially with relation to the Company's pension and 401(k) and retiree health care proposals, Farberman admitted the Company's interest in achieving alignment with the Frontier employee benefit program set forth in the Bulletin. His unwillingness to be open about this and seeming lack of candor on this score during cross-examination represents a company attempt to minimize the importance it attached to one of its bargaining goals, perhaps because of the adverse impact it felt this might have on its good faith in reaching impasse. Yet, the Government does not argue that an insistence on achieving alignment or unity with other Frontier entities on employee benefits is an illegal, or even, a permissive bargaining posture (in *AFTRA v. NLRB,* supra at 626 the court noted, without disapproval, that the Company was seeking major changes to bring the contract in line with its contracts in other parts of the country), only that the Union was unaware of a change in goals, particularly at the April 8 session when it received no feedback of the Company's reliance on its rough costing out of the Union's counterproposal. I find that the Company's reliance on both alignment and the new competitive environment was consistently exhibited throughout the bargaining and, indeed, as I have earlier noted, represented a single, or, at least, overlapping and integrated, goals.

The Union, in its brief, also seeks to impugn the Company's good faith in bargaining at pages 4, 24, 34, and 35 of its brief. However, it is clear that the Union's charge of surface bargaining was dismissed by the Region following an investigation, and that dismissal was affirmed after the Union's attorney submitted a lengthy letter brief seeking to reverse the Region. In a dismissal letter which I earlier quoted, affirmed on appeal, the Acting Regional Director found insufficient grounds to conclude that the Company had engaged in surface bargaining after having had an opportunity to review the facts regarding the Company's bargaining stance, including its goal of achieving alignment and its fixed positions on the five key issues, from which it deviated little, over the final 2 months of bargaining.[8] Thus, any reliance which either the Government or Union seeks to place on the Company's alleged lack of good faith during the course of bargaining is rejected.

I have previously found that Farberman's reliance on comments Flavin made at the March 7, 1996 bargaining session was misguided and did not support his conclusion that the Union was unwilling to enter into and set aside tentative agreements on individual bargaining terms pending a final over all agreement on a successor contract. In fact, as I pointed out, a number of agreements were made at, and following, that session and Farberman acknowledged the Union's willingness to withdraw prior positions and thus resolve differences over specific terms, with remaining differences over other terms being of a minor or technical nature. However, Farberman's misreading of Flavin's response to his question about the willingness of the Union to embrace the Company's 401(k) plan, did not, in my judgment, undermine or compromise the Company's positions and its responses during subsequent discussions with the Union on the pension 401(k) issues and, in particular its response to the Union's April 8 counterproposal on these issues.

In answering questions during his examination about the Company's understanding of and response to the union pension and 401(k) counterproposal set forth at paragraph 21, contrary to the counsel for the General Counsel's conclusion at page 20 of his brief, Farberman did not admit that the Union's pension and prepension proposals represented movement towards Respondent's position. As I have earlier noted, after stating that the first three sentences of the Union's option B proposal did bring the parties closer together, Farberman then went on to explain in detail how the multiple conditions the Union had placed on its agreement to freeze the pension and eliminate prepension leave starting with the fourth sentence, and how the subsequent two paragraphs of option B relating to the single 401(k) plan, all added significant costs not comprehended by the Company's final offer and were in fact, seriously regressive. (Tr. 1183–1191.) Aside for these union demands which separated the parties significantly, Farberman here also referred to the Union's Option A which added other costs related to the prepension leave, as well as its compensation proposal which as late as April 8, would have added a substantial wage increase to the Company's far more limited undertaking to provide bonuses geared to profits and productivity, as widening a continuing breach between the parties justifying its declaration of an impasse in bargaining.

From the foregoing, it is evident I have concluded that the Company did not engage in either "bad-faith" bargaining or bargaining which either failed to take into account changes in the Union's bargaining positions or minimized the effort by the Union to seek to arrive at tentative agreements on individual issues where the changes in the parties' positions warranted them. I have also concluded that for its part the Union did not engage in "pattern" bargaining seeking to impose terms primarily because they had been agreed to by other employers or in other bargaining units.

Turning to other relevant factors considered in determining whether a bargaining impasse occurred on April 8, by that date the parties had met 50 times. It is also true that written proposals were not exchanged until December 14, 1995. Thereafter, the parties met about 15 times in formal bargaining sessions and at least once informally and engaged in an extensive exchange of correspondence, including submission of comprehensive information from the Company to the Union. As early as December 14, the Company was advising the Union of its intent to eliminate the payment of prepension leave, establish a standard corporate benefit and retirement plan with the Frontier Bulletin serving at least as a guide for its contents, eliminate tier, meal and mileage payments, and establish a second-tier wage and benefit schedule. Accordingly, well before the expiration of the agreement on January 31, 1996, the Union had become aware of the Company's intent to freeze the pension, eliminate prepension and general wage increases, conform the health benefits plan to the Frontier program by introducing Tel Flex and limiting company contributions for health insurance, particularly for rider coverage, and utilizing a single 401(k) plan with limited company contributions as the sole retirement income vehicle for all new employee and as a significant such vehicle for all other pension eligible employees.

The counsel for the General Counsel argues that by virtue of these series of company proposals, which constituted a drastic change, in direction and, in the Union's view, a severe reduction in, benefits injurious to employees, the 40-year history of bargaining between the parties must be seriously discounted. As the period of sustained bargaining, spanning the time frame during which comprehensive bargaining proposals were exchanged and reviewed, covered only 15 odd sessions out of a total of 50, the period of time during which the Union could be expected to absorb, become informed about, and respond intelligently to such drastic changes until the Company's declared impasse, was severely limited and consequently, legally unjustified. The General Counsel further argues that to the extent the Company failed to provide timely relevant information sought by the Union during this time frame, the Union lacked the capacity to bargain and thus the Company's declaration of impasse on April 8 was premature.

I am not persuaded by these arguments. As I have noted, and reiterated, the Union was very early made acutely and continuously aware of the changed market conditions introduced with approval of the OMP, and the competitive forces the Company was already facing which it argued, required it to limit costs, become more efficient and responsive to customer needs for increased service and more competitive pricing. Indeed, even before the onset of bargaining, the Union had provided written support for approval of the OMP and so was, or should have been, generally aware of the consequence of the changed local market conditions. Surely, upon its receipt early in bargaining of copies of the Frontier Bulletin, which spelled out the parameters of the new employee benefit plan to which the Company intended to conform insofar as it was possible,

[8] In accordance with the conclusions of the Acting Regional Director and Office of Appeals, I conclude that the Union's attempt to show that the Company's failure to respond for a period of time to its request for information about possible sale of the business, is not relevant to the issues which led to the impasse and, in any event, was subsequently rendered moot.

the Union had received first hand knowledge of the direction the company bargaining would take. Thus, there was sufficient time over the 6-month bargaining timeframe, and even within the almost 4 months from receipt of the Company's first set of written proposals, for the Union to seek to satisfy employer goals. Surely, by the time the Company issued its final proposal on February 29, 1996, the Union, which had already been engaged in a major corporate campaign to seek reversal of the Company's bargaining plan, had sufficient time to modify its own proposals to seek major accommodations with the Company's final offer with respect, in particular, to the benefit package. In this respect, I note here my rejection of the General Counsel's claim that the Union was taken by surprise by the Company's final offer of February 29 and by its rejection of the Union's and Ash's February 26 demand to continue the pension plan, particularly in light of Farberman's credited description of his chance encounter with Ash at the February 26 session.

I also do not agree with the General Counsel that the Union's information requests forestalled the declaration of impasse. The counsel for the General Counsel does not point to any particular request which the Company did not answer or delayed answering which adversely impacted upon the Union's timely preparation of counterproposals in the five key areas. I have recounted, in detail, the Company's positive responses to all information requests. In particular, I have noted McGrath's facility recollection that the Company did not, by March 20, provide the detailed information relating to company subcontracts. Accordingly, the counsel for the General Counsel's reliance on *Dependable Building Maintenance Co.*, 274 NLRB 216 (1985), which held a declaration of impasse to be premature where the Union had insufficient time to review requested information relevant to the negotiation, is misplaced.

As to the subcontracting issue, the Acting Regional Director's dismissal of the union charge in Case 3–CA–19917 alleging the failure to abide by terms of the subcontracting agreement in the expired contract as a refusal to bargain, was affirmed on appeal by the General Counsel, who held that dispute to be one over contract interpretation. The Acting Regional Director, in addition, found that the subcontracting did not have an adverse impact upon the bargaining unit employees, and this finding was not disturbed on appeal.

It is also evident from the occasions on which Farberman was informed by Palmer, Ash, and Patrician, in so many words or by the strongest implication that the Union would never agree to freeze the pension for eligible employees thereby excluding future employees from the pension plan and relying solely on the 401(k) for an inadequate retirement protection for all employees, that the Union was well aware by February 23, 1996, a month and a half before the Company declared impasse, of the parameters of the Company's pension and 401(k) proposals and had reviewed voluminous information submitted by the Company, and had studied in detail the adverse impact these proposals would have on employee and retiree benefits.

While it is true that over the latter course of bargaining from early January, to early February 1996 the parties had signed off on 22 tentative agreements, and had resolved disputes over several other bargaining subjects thereafter without signing off on them, major differences remained over the issues which the Company, and even the Union viewed as key issues to resolving their dispute and agreeing to a successor agreement. I have no doubt that the Union also viewed the second-tier wages, subcontracting, and overtime, among other issues, as significant in the continuing dispute. But the Union, by statements its representatives made at the sessions from February 26 onward, and by the counterproposals it made and sought to justify, clearly saw, as did the Company, that unless the five key issues were resolved there was no real chance of bridging the gap between them.

The central inquiry thus becomes whether the Union made sufficient progress in meeting the Company's perceived needs and goals by the counterproposals it made and by the signals its conduct both at, and away from, the bargaining table conveyed to the company team, particularly its spokesperson Farberman, as time passed beyond the issuance of the Company's final proposal and as Farberman continued to goad and push the Union to recognize the impasse which was looming.

My conclusion is that by April 8, 1996, the parties were deadlocked on each of the five key issues and that even the Union could not have reasonably believed that its counterproposals of March 7, and particularly April 8, warranted the Company in continuing to bargain at that time. I accord little weight to contrary statements on the record and in correspondence made by Palmer, and conclude, just as did the administrative law judge in *Grand Auto,* 320 NLRB 854, 858 (1996), that the union negotiator's understanding that the parties were not at impasse, was colored by the fact that he simply did not want impasse or implementation of the final offer. Just as in the instant proceeding, the Union's position in *Paccar* was driven, in part, by the political repercussions of agreeing to reduce employee rights or benefits. It is thus apparent that the *Taft* factors I have reviewed and applied support finding an impasse on April 8.

From mid to late February 1996, the Company's position was firm, and it continually informed the Union that it was not prepared to move or reexamine its position in the face of continued union intransigence on wages, pension, employee and retiree health benefits and prepension leave. The Union's delay in responding to the Company's firm positions and, indeed warnings that, without serious movement on these issues, it was prepared to unilaterally implement its final offers, can only be explained by the Union's unwillingness to give up a sufficient guaranteed minimum retirement income for present and future employees, and maintained and improved salary levels, and its fear that if it did so, it would not be serving the best interests of its members, and the CWA would face serious repercussions in bargaining nationwide in other units.

The Union's response was firm and uniform, expressed on the record most directly by McGrath but also by Patrician and Palmer, in remarks attributed to them and repeated by Palmer that the Union could not afford to give up for its members, the value of the present pension plan and that only guaranteed contributions of a certain fixed level in a savings and investment vehicle, however described, would satisfy the perceived needs of both the local union members and the international Union. These bargaining goals, expressed in abstruse and complicated language in the Union's April 8 counterproposal was readily understand by Farberman as a rejection of the Company's final proposals. In this respect the Union's contemporaneous corporate campaign was viewed, not unreasonably by the Company, as an effort to compel it to recognize the Union's and employees needs as expressed in the proposals its team made at the bargaining table. Under such circumstances, parties to negotiations are not required to "to engage in fruitless marathon discussions at the expense of frank statement" during negotiations, *NLRB v. American National Insurance Co*., 343 U.S. 395, 404 (1952).

When Farberman declared impasse and the Company determined to implement its last offer, neither at the table nor in his letter response to Farberman, did Palmer indicate what subject areas the Union was prepared to move on and to what extent it was prepared to move. Neither did Palmer explain at the table the source of monies which, in his testimony, he viewed as sufficient to fund the lump sum payout in option A or the guaranteed 6-percent contribution to the 410(k) in option B, which was disputed by Farberman at trial. The Union thus failed at a crucial meeting at a time when impasse was imminent, to provide the Company with any signal that it was amenable to further movement. I conclude that insofar as it appeared to accept the principles of pension freezing, prepension leave discontinuance and a single 40l(k) savings and investment plan, its acceptance was illusory. I have previously presented Farberman's view of the regressive nature of its offers and I agree with him. Upon the facts appearing of record, I conclude that the Company did make approximate calculations in caucus, and reasonably concluded that the costs generated by the Union's wage, pension and 401(k) proposals were prohibitive. I further conclude that the Union was aware that the increased costs implicit in its proposals would reasonably create a serious problem for the Company. Based on this conclusion, I reject the General Counsel's argument at page 20 of his brief that Respondent's failure to identify the economic nature of its objections to the Union's option A and B pension/401(k) proposal prevented the Union from showing additional flexibility.

Just as the Board notes in *Taft Broadcasting Co.,* supra, in a similar conflict, the radical changes the Company wanted in certain terms of employment, when viewed by the Union, meant serious loss to its members. Both parties took strong positions. Even the acting regional director here has described the Company as engaging in hard bargaining and I would agree. In spite of the radical and fairly extreme nature of the Company's economic proposals the Board has also stated that it will not directly or indirectly compel concessions "or otherwise sit in judgment upon the substantive terms of collective-bargaining agreements," *Chevron Chemical Co*., 261 NLRB 44, 46 (1982). It is also true that the Union maintained what it perceived to be a principled position to provide its members a sufficient retirement income and salary while employed which would maintain their current standard of living in the face of imponderables created by the new competitive market, volatility in the price of the Company's stock and Frontier's Corporation effort to align all affiliates. But, just as the Board noted in *Taft,* on similar facts, progress was imperceptible on the critical issues and each side, truly were aware they were further apart on some of these issues, particularly compensation, pension and the 40l(k) plan, than when they had begun negotiations. In accord: *Prentice Hall, Inc.,* 306 NLRB 31, 37, 40 (1992), on the issue of impasse; *Times Herald Printing Co.*, 223 NLRB 505 and fn. 5 (1976); *Larsdale, Inc.,* 310 NLRB 1317, 1320 (1993); *Hayward Dodge*, 292 NLRB 434, 468–470 (1989).

Inasmuch as the mediator was sought by each of the parties for different reasons, the Company in order to convince the Union to embrace its key issues, and the Union to persuade the Company to change its fixed positions on wages, pension and the like, and was only introduced into the process after positions had become hardened on each side and were unlikely to be influenced by mediation, I am not persuaded that the very limited involvement of the Federal mediator, his single presession briefing by the Company and his participation at only the last abbreviated bargaining session, warrants the conclusion that his further participation in the bargaining process would have foreclosed the declaration of impasse at the April 8th session, or that further bargaining at this time, even with the mediator's assistance, would not have been futile. See, e.g., *Powell Electrical Mfg. Co.,* 287 NLRB 969 (1987).

The counsel for the General Counsel places great reliance on the analysis and holding in *Serramonte Oldsmobile,* 318 NLRB 80 (1995), to support its argument that the Board has created a very high standard for establishing futility in bargaining. In *Serramonte,* the Board affirmed the administrative law judge who had concluded that after a bargaining impasse had occurred, so long as the Union had indicated, however ambiguously and even insincerely, a willingness to take a further look at the employer's flat rate and 401(k) proposals, "negotiations had not reached a point where there was no realistic possibly that continued discussion would have fruitful." Id. at 98. The administrative law judge concluded that under these circumstances, the union lawyer's comments so characterized, should have caused the employer to contemplate what the Union was reconsidering and to have tested and probed the announced change in position. The short answer to this argument is that unlike *Serramonte,* no bargaining impasse had taken place when the Union presented its April 8 counterproposal. Furthermore, neither by its counterproposal nor by any contemporaneous statements did Palmer or any one else on the union committee, signal any positive movement. As I have earlier concluded, by virtue of the multiple conditions which it attached to its proposals, the Union's claimed adoption of the principles of a frozen pension plan, ending of prepension benefits and a single 401(k) plan as contemplated by the Company's final offer, was illusory. If anything, the signal from the Union in its presentation, was that it sought parity with the values and benefits contained in the current pension plan and prepension leave through the vehicle of the 401(k) plan. Its proposal was clearly regressive and was so understood by the Company. Thus, *Serramonte* is also inapposite for this reason.

There is another reason why I reject *Serramonte* as supporting the Government's position. On judicial review before the District of Columbia Circuit Court of Appeals (opinion by Chief Judge Harry Edwards) the Board in *Serramonte* was reversed as to its conclusions with regard to employer Service Plaza, and the Court took particular pains to reject the administrative law judge's reasoning on the facts of record on the very point which the General Counsel urges before me. Thus, the court noted the absence of any "substantial evidence" in the record to support the conclusion that the impasse (which the Board found and the court did not dispute) was subsequently broken by the assertion of a union position which was hardly free of ambiguity. The court further noted that the Board itself has indicated that a party's "bare assertions of flexibility on open issues and its generalized promise of new proposals [do not clearly establish] any change, much less a substantial change" in that party's negotiating position, citing *Civic Motor Inn*, 300 NLRB 774, 776 (1990), for this proposition. The court concluded that there must be substantial evidence in the record that establishes changed circumstances sufficient to suggest that future bargaining would be fruitful, *Serramonte Oldsmobile, Inc. v. NLRB,* 86 F.3d 227, 232–233 (D.C. Cir. 1996), reversing *Serramonte Oldsmobile,* 318 NLRB 80 (1995). It thus appears that *Civic Motor Inn* more appropriately represents the Board's position as to the nature of the evidence necessary to show that an impasse once established, has been broken and that circumstances exist under which an employer has an obligation to probe a union's assertion of a change in position. At the minimum, such a change must surely encompass a new position or specific proposals responsive to the employer's bargaining proposals. Such was not the case in *Serramonte* nor in the instant proceeding.

As a consequence of the foregoing statement of facts and legal analysis I am persuaded, and conclude that Respondent has established by a preponderance of evidence, see *North Star Steel Co.,* 305 NLRB 45 (1991), that the parties were at impasse on April 8, 1996, and, accordingly, Respondent was free to unilaterally implement its final offer as of that date.

CONCLUSIONS OF LAW

1. The Respondent, Rochester Telephone Corporation, is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Local 1170 of the Communications Workers of America, is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. The General Counsel has not established by a preponderance of the evidence that the Respondent has violated the Act in any manner as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The complaint is dismissed.

---

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.